TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934

No. 35

NATIONAL PAPER PRODUCTS COMPANY,
PETITIONER,

vs.

GUY T. HELVERING, COMMISSIONER OF
INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 10, 1934

CERTIORARI GRANTED JUNE 4, 1934

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

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PETITIONER,

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GUY T. HELVERING, COMMISSIONER OF
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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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APPEARANCES.

For Taxpayer:

JOHN F. NEYLAN, Esq.,
J. P. MILLER, Esq.,
W. C. MAGATHAN, Esq.,

For Comm'r:

HENRY A. COX, Esq.,
F. R. SHEARER, Esq.,
T. CALLAHAN, Esq.

Docket No. 41758

NATIONAL PAPER PRODUCTS COMPANY, a Corporation,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES.

Transferred to Mr. Murdock 3/28/32.

1928

Dec. 6—Petition received and filed. Taxpayer notified. (Fee paid)

" 7—Copy of petition served on General Counsel.

" 29—Motion to consolidate for hearing with dockets 41759 and 35599, filed by taxpayer.

1929

Jan. 21—Answer filed by General Counsel.

" 23—Copy of answer served on taxpayer. Circuit Calendar.

" 28—Motion of December 29 to consolidate, granted.

1931

Mar. 11—Motion to segregate from docket 35599 but to remain consolidated with docket 41759 filed by taxpayer. 3/13/31 granted.

Jun. 10—Hearing held before E. H. Van Fossan, Div. 9 on the merits. On motion, consolidated with 41759. Amended petition filed, copy served on respondent—amended answer dictated into record. Briefs due in 60 days.

Jul. 10—Motion for extension of 30 days to file answer to amended petition filed by General Counsel.

" 13—Transcript of hearing of June 10, 1931 filed.

" 13—Motion for extension (July 10) granted.

" 25—Answer to amended petition filed by General Counsel.

Aug. 3—Motion for 30 days to file brief, filed by taxpayer.

" 7—Motion for 60 days to file brief filed by General Counsel. July 11, 1931 granted.

" 10—Order allowing petitioner until September 8, 1931 to file brief entered.

1931

Sep. 7—Motion for extension to Oct. 7, 1931 to file brief filed by taxpayer. 9/10/31 granted.

Oct. 3—Brief filed by General Counsel.

" 8—Brief filed by taxpayer.

1932

May 17—Findings of fact and opinion rendered, John E. Murdock, Div. 3. Judgment will be entered for the respondent.

" 19—Decision entered, John E. Murdock, Div. 3.

" 21—Notice of appearance of J. Paul Miller as counsel filed.

" 25—Order that decision entered May 19, 1932 be amended as per this order entered. [1*]

Nov. 1—Supersedeas bond in the amount of $41,-500.00 approved and ordered filed.

" 1—Petition for review by U. S. Circuit Court of Appeals (9) with assignments of error filed by taxpayer.

" 1—Proof of service filed by taxpayer.

" 23—Praecipe filed.

" 23—Proof of service filed.

" 28—Statement of evidence lodged.

" 28—Notice of lodgment of statement and of hearing December 8, 1932 to approve statement filed.

" 29—Notice of change of hearing date from Dec. 8 to Dec. 7, 1932.

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*Page numbering appearing at the foot of page of original certified Transcript of Record.

1932

Dec. 6—Objections to statement of evidence filed by General Counsel.

" 7—Hearing had before Mr. Murdock on approval of statement of evidence. On respondent's motion, continued to Dec. 28, 1932.

" 7—Order of continuance to Dec. 28, 1932, entered.

" 19—Copy of order from U. S. Circuit Court of Appeals (9) enlarging time to Jan. 30, 1933 to file transcript filed.

" 20—Proof of service of objections filed by General Counsel.

" 28—Hearing had before J. M. Sternhagen on approval of statement of evidence, continued to Jan. 11, 1933 on petitioner's motion.

" 28—Order continuing hearing on approval of statement of evidence to Jan. 11, 1933 entered.

1933

Jan. 7—Order from Circuit Court of Appeals (9) to transmit petitioner's Exhibits 1 and 2 in original form, filed.

" 11—Hearing had before Mr. Arundell, Div. 7 on approval of statement of evidence—continued to Jan. 25, 1933.

" 11—Motion to postpone hearing filed by taxpayer—granted to 1/25/33.

" 24—Copy of order from 9th Circuit enlarging time to March 3, 1933 to file transcript filed.

1933

Jan. 25—Hearing had before Mr. Marquette on approval of statement of evidence. On motion of petitioner, continued to Feb. 15, 1933.

Feb. 15—Agreed statement of evidence approved and ordered filed.

" 15—Hearing had before Mr. Murdock on approval of statement of evidence. Agreed statement of evidence filed.

" 27—Copy of order from 9th Circuit for extension to April 3, 1933 to file transcript, filed.

Mar. 3—Copy of order from 9th Circuit for consolidation with docket 41759 filed. [2]

United States Board of Tax Appeals

Docket No. 41758

NATIONAL PAPER PRODUCTS COMPANY, a corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION.

The above named Petitioner hereby petitions for a redetermination of the deficiency set forth by the

Commissioner of Internal Revenue in his notice of deficiency (IT:AR:D:60D:CAM) dated October 10, 1928, and as a basis of its proceeding alleges as follows:

1. The Petitioner is a corporation organized under the laws of the State of California, and having its principal place of business at 534 Battery Street, San Francisco, California.

2. The notice of deficiency (a copy of which is attached and marked Exhibit "A") was mailed to the Petitioner on October 10, 1928.

3. The taxes in controversy are income taxes for the fiscal year ended April 30, 1925, and for Twenty Thousand, Six Hundred Fifty-seven and 41/100 Dollars ($20,657.41). [3]

The above total deficiency is based upon certain adjustments made by the Commissioner of Internal Revenue in his letter addressed to Zellerbach Paper Company, 534 Battery Street, San Francisco, California, dated October 10, 1928, which company is the parent of petitioner herein, and in his letter addressed to National Paper Products Company dated October 19, 1928. Included in these adjustments is the following addition to the net income of the Zellerbach Paper Company, a certain portion of which was allocated by the Commissioner to the said National Paper Products Company as shown in Schedule 16, page 19, of Treasury Department letter dated October 10, 1928, and addressed to Zellerbach Paper Company at the address aforesaid as follows:

"(d) Depletion claimed	$34,492.50
Corrected 3,679.20 cords at $4.12 in accordance with Engineers report for prior years	$15,158.30
Net disallowed	$19,334.20"

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) The Commissioner erred in determining the deficiency set forth in his Sixty Day Letter dated October 10, 1928, addressed to Zellerbach Paper Company, the parent of petitioner herein, and erred in determining the deficiency set forth in his [4] Sixty Day Letter dated October 10, 1928, addressed to petitioner herein, in relation to the taxes assessed against said Zellerbach Paper Company and against said National Paper Products Company for the fiscal year ended April 30, 1925, in that the Commissioner refused to allow a depletion rate of $9.375 per cord on timber owned by said taxpayer, and the parent company of said taxpayer, to-wit; Zellerbach Paper Company.

5. The facts upon which the Petitioner relies as the basis of this proceeding are as follows:

Zellerbach Paper Company, parent of petitioner herein, in making its consolidated income tax return for the fiscal year ended April 30, 1925, which included income of petitioner, claimed depletion on

certain timber owned by it in the aggregate sum of $34,492.50. This total sum was made up by adopting a depletion rate of $9.375 per cord on a total of 3,679.24 cords.

The Commissioner allowed a depletion rate on said 3,679.24 cords at the rate of $4.12 per cord, the total amount of depletion on said timber, as per Treasury Department letter dated October 10, 1928, and addressed to Zellerbach Paper Company, amounting to $15,158.30. [5]

This constituted a reduction of the total amount of depletion claimed by Zellerbach Paper Company in the sum of $19,334.20 and resulted in adding the sum of $19,334.20 to the income of the Zellerbach Paper Company for the fiscal year ended April 30, 1925. A certain portion of this additional income was allocated to Petitioner herein, and additional taxes in the sum of $20,657.40 were assessed against taxpayer for the period in question.

The taxpayer contends that a depletion rate of $9.375 per cord is the correct rate of depletion, and that depletion in the total sum of $34,492.50 should be allowed to the said Zellerbach Paper Company for the period in question and the proper amount allocated to Petitioner herein.

WHEREFORE the Petitioner prays that if and when the Respondent hereinabove named shall file an answer to this petition, said Board shall set said matter for hearing, and upon a hearing thereof, together with a hearing of appeal being filed for and on behalf of the said Zellerbach Paper Company, the Board shall find that the said Zellerbach Paper Com-

pany was and is entitled to a depletion rate of $9.375 per cord on 3,679.20 cords, and is entitled to a total depletion in the sum of $34,492.50, and further that the petitioner herein is entitled to have the proper amount of depletion allocated to it and the proper deduction from income allowed for the period in question. Petitioner [6] further prays that said Board find that the consolidated return of the Zellerbach Paper Company including the income of taxpayer herein filed by the said Zellerbach Paper Company for the fiscal year ended April 30, 1925 (except as to changes heretofore proposed by the Commissioner, in which suggested changes the taxpayer has acquiesced), be found to be correct. The Petitioner further prays for such other relief as the nature of the case may require and which the Board may deem equitable and proper in the premises.

JOHN FRANCIS NEYLAN
Counsel for Petitioner, 901 Crocker
First National Bank Building,
San Francisco, California. [7]

State of California
City and County of San Francisco.—ss.

J. D. Zellerbach, being duly sworn, says that he is the President of National Paper Products Company, a corporation, and that he is duly authorized to verify the foregoing petition and is familiar with the statements contained therein, and that the facts are true, except as to those facts stated to be upon in-

formation and belief, and those facts he believes to be true.

[Seal] J. D. ZELLERBACH

Subscribed and sworn to before me this Third day of December, 1928.

[Seal] LULU A. GODSIL

Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires September 13, 1931. [8]

EXHIBIT "A"

TREASURY DEPARTMENT
Washington

Office of
Commissioner of Internal Revenue

Oct. 10, 1928

National Paper Products Company,
1789 Montgomery Street,
San Francisco, California.

Sirs:

In accordance with Section 274 of the Revenue Act of 1926 you are advised that the determination of your tax liability for the years 1924, 1925 and 1926 discloses a deficiency of $35,307.22 for the years 1924 and 1925 and an overassessment of $11,849.04 for the years 1926 as shown in the attached statement.

The section of the law above mentioned allows you to petition the United States Board of Tax Appeals within sixty days from the date of the mailing of this letter for a redetermination of your tax liability. However, if you acquiesce in this determination, you are requested to execute the enclosed Form 866 and

forward both original and duplicate to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7.

Respectfully,
D. H. BLAIR,
Commissioner.
By C. B. ALLEN
Deputy Commissioner. [9]

IT:AR:D:60D
CAM

STATEMENT OF RETURNS EXAMINED
AND
RESULTING TAX LIABILITY

Company	Fiscal Years	Deficiency in Tax	Over assessment
National Paper Products Company, San Francisco, California.	1924	$14,649.82	
	1925	20,657.40	
	1926		$11,849.04

The adjustments producing the above-stated results are the same as shown in Bureau letter dated August 31, 1928 and are shown in Schedules attached to a letter addressed to Zellerbach Paper Company, San Francisco, California.

A certificate of overassessment will be issued for the amount shown above through the office of the Collector of Internal Revenue for your district, and will be applied by that official in accordance with the provisions of Section 284 (a) of the Revenue Act of 1926.

[Endorsed]: Filed U. S. Board of Tax Appeals, December 6, 1928. [10]

[Title of Court and Cause.]

ANSWER

The Commissioner of Internal Revenue by his attorney, General Counsel, Bureau of Internal Revenue, for answer to the petition filed by the above-named petitioner, admits and denies as follows:

1. Admits all the material allegations contained in paragraph 1 of the petition.

2. Admits that the deficiency letter was mailed to the petitioner on October 10, 1928, but denies that a true copy of said deficiency letter is attached to the petition as alleged in paragraph 2 of the petition.

3. Denies all the material allegations contained in paragraph 3 of the petition, except the allegation that the tax in controversy is income tax in the amount of $20,657.41 for the fiscal year ended April 30, 1925.

4-(a). Denies that the respondent committed error in the determination of the deficiency as alleged in paragraph 4 of the petition.

4-(b). Denies that any error was made in the determination of the deficiency referred to in deficiency letter dated October 10, 1928.

5. Denies all the material allegations contained in paragraph 5 of the petition. [11]

6. Denies generally and specifically each and every allegation in the petitioner's petition contain-

ed not hereinbefore admitted, qualified or denied.

WHEREFORE, it is prayed that the petitioner's appeal be denied.

(Signed) C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
J. ARTHUR ADAMS,
Special Attorney,
Bureau of Internal Revenue.

[Endorsed] United States Board of Tax Appeals. Filed Jan. 21, 1929. [12]

[Title of Court and Cause.]

AMENDED PETITION

Now comes the above named petitioner and amends its Petition heretofore filed in the above entitled matter and hereby petitions for a re-determination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:AR:D:60D:CAM) dated October 10th, 1928, and as a basis for its proceeding alleges as follows:

1. The Petitioner is a corporation organized under the laws of the State of California, and having its principal place of business at 534 Battery Street, San Francisco, California.

2. The notice of deficiency, a copy of which was attached to the original petition filed herein and marked Exhibit "A", and which is incorporated

herein by reference thereto, was mailed to the petitioner on October 10, 1928.

3. The taxes in controversy are income taxes for the fiscal year ended April 30, 1925, and for Twenty Thousand Six Hundred and Fifty Seven and 41/100 ($20,657.41) Dollars. [13]

4. The determination of tax as set forth in the said notice of deficiency is based upon the following errors:

(a) The Commissioner erred in determining the deficiency set forth in his sixty day letter dated October 10th, 1928 in relation to taxes due for the fiscal year ended April 30, 1925 by reason of the fact that the assessment of any additional taxes for said fiscal year and the collection of any additional taxes for said fiscal year and any proceedings in relation thereto were and are barred by the Statute of Limitations in force and effect at the time of the mailing of the deficiency letter dated October 10, 1928, and prior thereto and now in force and effect, and particularly by reason of the provisions of the Revenue Act of 1926 and more specifically Section 277(a)(1) thereof; also by reason of the provisions of the Revenue Act of 1928 and particularly Section 1 thereof.

5. The facts upon which the petitioner relies as a basis of this proceeding are as follows:

(a) Petitioner during the fiscal year ended April 30, 1925 was a subsidiary of Zellerbach Paper Company, a corporation duly organized and existing under and by virtue of the laws of the State of California; that the income of this petitioner for the fiscal year in question [14] was included in a con-

solidated income tax return filed by the Zellerbach Paper Company with the Collector of Internal Revenue at San Francisco, California on July 15, 1925; that said consolidated return also included the income of the Sanitary Products Corporation. Petitioner alleges that said return was full and complete and had attached thereto all necessary schedules to enable the Commissioner of Internal Revenue to determine the tax due from this petitioner and its parent, Zellerbach Paper Company; that said return was filed in strict compliance with the Revenue Act of 1924 then in force and effect, and said return was neither false nor fraudulent.

(b) Said return was thereafter examined by the Commissioner of Internal Revenue and the tax reported therein, to-wit, the sum of One Hundred and Fifty Eight Thousand Three Hundred and Seventy Four and 05/100 ($158,374.05) Dollars, which included the tax due on the income of this Petitioner, was thereafter assessed, and was thereafter paid by the said Zellerbach Paper Company on behalf of itself and on behalf of this Petitioner, said payments occurring on the following dates:

July 15, 1925, $39,593.51;

October 16, 1925, $39,593.52;

January 16, 1926, $39,593.51;

April 16, 1926, $39,593.51. [15]

(c) That on the 26th day of February, 1926, the the Revenue Act of 1926 theretofore adopted by the Congress of the United States, was approved by the President of the United States. That said Revenue Act of 1926 became effective as of the date of its

adoption, to-wit, February 26, 1926, except that certain parts thereof became effective retroactively as of January 1st, 1925. That by reason of the retroactive provisions of said act increasing the rate of tax upon the net incomes of corporations during the calendar year 1925 from 12½% to 13%, the Commissioner of Internal Revenue issued Treasury Decision No. 3843 on the 28th day of February, 1926. That after the promulgation of the Treasury Decision No. 3843 as above set forth, a copy of same was mailed to Zellerbach Paper Company, parent of this Petitioner, by the Collector of Internal Revenue at San Francisco, California, requesting that the filing of an amended income tax return as provided for therein be given immediate attention.

(d) That after the receipt of a copy of Treasury Decision No. 3843 by the Zellerbach Paper Company, parent of this Petitioner, as aforesaid, the said Zellerbach Paper Company on behalf of itself, and on behalf of this Petitioner and on behalf of Sanitary Products Corporation, filed an amendment to its income tax return theretofore [16] filed wherein there was set forth the amount of tax originally reported in its income tax return and the additional amount of tax due from the said Zellerbach Paper Company and its subsidiaries, including this Petitioner by reason of the increase in rate from 12½% to 13% as provided in the Revenue Act of 1926; the amount of tax reported therein was Two Thousand One Hundred and Eleven and 65/100 ($2,111.65) Dollars, and on the 15th day of May, 1926, said additional tax was paid. That no schedules of any

kind or character were attached to the amendment to the income tax return filed as aforesaid and that no data were set forth therein except as hereinabove set forth.

(e) That the deficiency letter from which this appeal has been taken was mailed to the Petitioner on October 10, 1928; that the Revenue Act of 1926, and particularly Section 277 (a) (1) governs the time within which an additional assessment may be made against this Petitioner for its fiscal year ended April 30, 1925; that the period of time set forth in said act is three years; that more than three years elapsed between the date of the filing of its original income tax return by Zellerbach Paper Company on July 15, 1925 which included the income of this Petitioner for the fiscal year in question [17] and the date of the issuance of the sixty day letter on October 10, 1928. That by reason of the facts set forth herein, said Commissioner is barred from assessing and/or collecting any additional taxes from this Petitioner for the fiscal year ended April 30th, 1925.

WHEREFORE, the Petitioner prays that upon a hearing of the above entitled matter the Board shall find that there are no additional taxes due from this Petitioner for the fiscal year ended April 30th, 1925, further that said Board shall find that the assessment and the collection of any additional taxes from this Petitioner is barred by the Statute of Limitations and particularly by reason of the provisions of the Revenue Act of 1926. The Petitioner prays for such further and other relief as the nature of

the case may require and which the Board may deem equitable and proper in the premises.

JOHN FRANCIS NEYLAN,
Counsel for the Petitioner,
901 Crocker First National Bank Bldg.
San Francisco, California [18]

State of California,
City and County of San Francisco.—ss.

E. M. Mills, being duly sworn, says that he is the Vice-president of National Paper Products Company, and that he is duly authorized to verify the foregoing petition, and is familiar with the statements contained therein, and that the facts are true, except as to those facts stated to be upon information and belief, and those facts he believes to be true.

E. M. MILLS.

Subscribed and sworn to before me this Ninth day of June, 1931.

(Seal) LULU A. GODSIL,
Notary Public in and for the City and County of San Francisco, State of California.

My commission expires September 13, 1931.

[Endorsed]: United States Board of Tax Appeals. Filed at hearing June 10, 1931. [19]

[Title of Court and Cause.]

ANSWER TO AMENDED PETITION.

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau

of Internal Revenue, for answer to the amended petition of the above-named taxpayer, admits and denies as follows:

(1) Admits the allegations of paragraph 1 of the amended petition.

(2) Admits the notice of deficiency was mailed to the petitioner on October 10, 1928.

(3) Admits the allegations of paragraph 3 of the amended petition.

(4) Denies the respondent erred in the determination of the deficiency and specifically denies that the respondent erred in the respects alleged in paragraph 4 (a) of the amended petition.

(5) (a) Admits that petitioner during the fiscal year ended April 30, 1925 was a subsidiary of the Zellerbach Paper Company, a corporation duly organized and existing under and by virtue of the laws of the State of California; that the income of petitioner for the fiscal year in question was included in a consolidated income tax return with the Zellerbach Paper Company filed with the Collector of Internal Revenue, San Francisco, California, on July 15, 1925, which consolidated return also included the income of Sanitary Products Corporation. [20]

Admits that said return was filed under the provisions of the Revenue Act of 1924, then in force and effect, and further admits that said return was not a false or fraudulent return filed with intent to evade tax.

(b) Admits that after the filing of said return

on July 15, 1925, the Commissioner duly assessed the tax shown thereon to be due, in the amount of $158,374.05.

(c) Admits the first two sentences contained in subparagraph (c) of paragraph 5 of the amended petition; admits that on or about the 28th day of February, 1926, the Commissioner with the approval of the Secretary of the Treasury, issued Treasury Decision Number 3843; admits the allegations contained in the last sentence of subparagraph (c) of paragraph 5 of the amended petition.

(d) Admits that after the receipt of a copy of Treasury Decision 3843, by the Zellerbach Paper Company, parent of said petitioner, the said Zellerbach Paper Company, on behalf of itself and on behalf of petitioner, and on behalf of the Sanitary Products Corporation filed a return on Form 1120-A under the provisions of the Revenue Act of 1926, and reported thereon additional tax due from the said Zellerbach Paper Company and its subsidiaries in the amount of $2,111.65, which amount was thereafter duly assessed; admits that no schedules of any kind or character were attached to said last mentioned returns, and that no data was set forth therein except the insertion in line 25 of the same amount of net income, namely, $1,266,992.39, being the same amount of net income as disclosed on the consolidated return filed July 15, 1925. [21]

(e) Admits that the deficiency letter from which this appeal has been taken was mailed to the petitioner on October 10, 1928.

Respondent denies each and every allegation contained in said amended petition except as hereinabove admitted or qualified.

WHEREFORE, it is prayed that the appeal be denied.

(Signed) C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
HENRY A. COX,
Special Attorney,
Bureau of Internal Revenue.

[Endorsed]: United States Board of Tax Appeals. Filed Jul. 25, 1931. [22]

[Title of Court and Causes—Docket Nos. 41758, 41759.]

FINDINGS OF FACT AND OPINION.
Promulgated May 17, 1932.

The statutory period of limitation for assessment had not run on October 10, 1928, where a return for a fiscal year ended April 30, 1925 was filed pursuant to the 1924 Act on July 15, 1925, and a return for the same period showing increased tax was filed pursuant to the 1926 Act and T. D. 3843 on May 14, 1926.

John Francis Neylan, Esq., for the petitioners.

H. A. Cox, Esq., and F. R. Shearer, Esq., for the respondent.

The Commissioner determined the following defi-

ciencies for the fiscal year ended April 30, 1925:

Zellerbach Paper Company	$ 7,601.55
National Paper Products Company	20,657.40

The only assignment of error is that the statute of limitations had barred assessment and collection of any additional taxes for this fiscal year prior to the day on which the notice of deficiency was mailed.

FINDINGS OF FACT.

The two petitioners are California corporations having their principal place of business in San Francisco.

On July 15, 1925 Zellerbach Paper Company filed a consolidated income tax return on behalf of itself and its subsidiaries National [23] Paper Products Company and Sanitary Products Corporation, under the provisions of the Revenue Act of 1924. It included the income of all three companies. This was not a false or fraudulent return filed with intent to evade tax. The amount of tax shown to be due on this return, to-wit, $158,374.05, was duly assessed by the Commissioner. This return, as the affidavit states, was a return made pursuant to the Revenue Act of 1924.

The Revenue Act of 1926 was approved February 26, 1926. On February 28, 1926 the Commissioner of Internal Revenue issued Treasury Decision 3843 which was as follows:

> Any corporation which has filed a return for a fiscal year ending in 1925 and paid or become liable for a tax computed under the Revenue

> Act of 1924, and is subject to additional tax for the same period under the Revenue Act of 1926, must file a new return covering such additional tax on or before May 15th, 1926. Payment of the additional tax may be made at the time the return is filed or if installment payments are desired, such installments must be paid at the time they would be due if based upon a return for the fiscal year ended February 28th, 1926.

A copy of this decision was mailed to Zellerbach Paper Company by the Collector of Internal Revenue at San Francisco in a letter advising the corporation to give its immediate attention to the matter of filing new returns and paying additional tax under the Revenue Act of 1926 for its fiscal year ending in 1925.

On May 14, 1925, after the receipt of this letter, the Zellerbach Paper Company filed a return on behalf of itself and its subsidiaries on Form 1120A, showing additional tax due in the amount of $2,111.65. This amount was thereafter duly assessed. This return, as the affidavit states, was a return made pursuant to the Revenue Act of 1926. No schedules were attached to this last mentioned return, and no data [24] were set forth therein except that in line 25 net income of $1,266,992.39 was set forth. This was the same amount of net income shown on the return filed July 15, 1925.

The notice of deficiency was mailed to the petitioners on October 10, 1928.

OPINION.

MURDOCK: The notice of deficiency was sent within four years of the date of filing of the first return, within three years from the date on which the Revenue Act of 1926 was approved, and within three years from the date upon which the last return was filed, but more than three years after the date upon which the first return was filed. The petitioners concede that the Commissioner may proceed to assess and collect the deficiencies unless the three-year period of limitation, provided by the Revenue Act of 1926, applies and began to run on July 15, 1925, the date upon which the first return was filed. [25]

We agree with the Commissioner that the return filed May 14, 1926, was the original return required under the 1926 Act to start the three-year period of section 277 (a) (1). We held in John Wanamaker Philadelphia, 8 B. T. A. 864, and in Hutchinson Company, 14 B. T. A. 367, that a return filed under one act would not start the period of limitation provided in a later act if additional tax was due under the new act for the period covered by the return. Other Board decisions to the same effect are Valentine-Clark Company, 14 B. T. A. 562 (reversed, 52 Fed. (2d) 346); Gus Holstine Dry Goods Company, 16 B. T. A. 1124; Isaac Goldmann Company, 17 B. T. A. 1103 (reversed, 51 Fed. (2d) 427); Myles Salt Company, Ltd., 18 B. T. A. 742 (reversed, 49 Fed. (2d) 232); Adams, Cushing & Foster, Inc., 19 B. T. A. 89; G. Corrado Coal &

Coke Interests, Inc., 19 B. T. A. 691; and E. J. Lorie et al., 21 B. T. A. 612. Cf. Hill Goldwater, 21 B. T. A. 73. We refer to our discussion of the question in the cited cases. The circumstances under which the additional tax arises in this case are different from those under which the additional taxes arose in the cases just mentioned, but perhaps the difference is not material. We have, however, some additional reasons for our position not expressed in those cases. We want to again call particular attention to the discussion of a similar issue in United States v. Updike, 1 Fed. (2d) 550, and in Updike v. United States, 8 Fed. (2d) 913 (certiorari denied, 271 U. S. 661), affirming the above decision. [26] That case differs from the present one only in degree. See also Davis Feed Company, 2 B. T. A. 616 and Covert Gear Co., Inc., 4 B. T. A. 1025.

Perhaps no revenue act specifically required the taxpayer to compute the tax as a part of his return. (See, however, section 240 (a), Revenue Act of 1926). Yet, a study of the various revenue acts, the rules and regulations of the Commissioner, the forms regularly used for making returns, and the way taxpayers themselves have interpreted the laws and regulations in making their returns, shows that a complete return is required and is understood to include a computation of the tax by the taxpayer himself. The acts gave the Commissioner authority to make and publish necessary rules and regulations. He required taxpayers to make their returns on certain forms which he furnished. These are

called income tax returns. They provided a place for a computation of the tax by the taxpayer. The tax thus shown to be due on the return becomes due and payable within nine months. No further assessment is necessary. If the Commissioner determines that more tax is due than that shown on the return, he must assess the additional tax within a prescribed time. This is the assessment which must be made within the period of limitation. If Congress has not specifically provided that the taxpayer shall make the computation and show on his return the amount of tax he believes is due, it has at least given clear indication that it intended to impose this duty upon each taxpayer. For example, in section 273 of the Revenue Act of 1926 "deficiency" is defined to be: [27]

> (1) The amount by which the tax imposed by this title exceeds the amount shown as the tax *by the taxpayer* upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax; * * * (Italics ours)

The petitioners did not compute, on the return filed in 1925, the tax which they believed to be due under the 1926 Act. Such a computation was impossible at the filing date. We think Congress intended that each corporation affected by the 1926

Act should file a return after the passage of that act, showing all required information, including the tax it believed to be due, and this return would start the three-year period for assessment. Furthermore, the Commissioner was required to make all needful rules and regulations for the enforcement of the act (section 1101); he required this taxpayer to file a new return; this rule was reasonable; and it must be given the force and effect of law. Maryland Casualty Company v. United States, 251 U. S. 342. The petitioners complied with the law and the ruling by filing the required return on May 14, 1926. Cf. section 1102 (a) and (b). This return, filed under the 1926 Act, could not amend the return filed under the 1924 Act so that the latter would become a return under the 1926 Act. The petitioners, in filing their return under the 1926 Act, adopted as a part thereof so much of the return theretofore filed under the 1924 Act as was appropriate and useful. There was perhaps no necessity for them to duplicate the computation of net income and the supporting schedules already on file. But they knew that additional tax was due under the new act and they had not [28] made an income tax return under the new act until they filed a return showing what tax they honestly believed was due. The computation under the 1924 Act was quite a different thing from the computation under the 1926 Act as is apparent from an examination of the two returns in evidence in this case. The statutory period for assessment began to run on May 14, 1926 when the original return under the 1926 Act was filed.

Reviewed by the Board.

Judgment will be entered for the respondent.

VAN FOSSAN, dissenting: The principle announced in the decisions of the Board on which the prevailing opinion in these cases is predicated has been considered by the Court of Appeals of the District of Columbia and the Circuit Courts of Appeal in three of the cases cited and in each instance the Board has been reversed. Valentine-Clark Co., 14 B. T. A. 562; reversed, 52 Fed. (2d) 346; Isaac Goldmann Co., 17 B. T. A. 1103; reversed, 51 Fed. (2d) 427; Myles Salt Co., 18 B. T. A. 742; reversed, 49 Fed. (2d) 232. On further consideration of the merits of the issue involved, I am convinced that the Board has been in error in all of these cases and that the petitioners should prevail.

GOODRICH agrees with this dissent. [29]

United States Board of Tax Appeals
Washington

Docket No. 41758

NATIONAL PAPER PRODUCTS COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION.

Pursuant to the determination of the Board, as set forth in its report promulgated May 17, 1932, it is

ORDERED and DECIDED: That there is a deficiency of $7,601.55 for the fiscal year ended April 30, 1925.

[Seal] (Signed) J. E. MURDOCK,
Member.

Entered May 19, 1932. [30]

[Title of Court and Cause.]

ORDER.

For good cause, it is

ORDERED that the last paragraph of the decision in this proceeding, entered under date of May 19, 1932, be and hereby is amended to read as follows:

"ORDERED and DECIDED: That there is a deficiency of $20,657.40 for the fiscal year ended April 30, 1925."

Entered May 25, 1932.

[Seal] (Signed) J. E. MURDOCK,
Member.

A true copy: Teste.

[Seal] B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals. [31]

[Title of Court and Cause.]

PETITION FOR THE REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS.

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Now comes National Paper Products Company, by its attorneys, Messrs. John Francis Neylan, and J. Paul Miller, and respectfully shows:

I.

Jurisdiction for Review.

This is a proceeding for review by the United States Circuit Court of Appeals for the Ninth Circuit of a decision of the United States Board of Tax Appeals, entered on the 19th day of May, 1932, as amended by that certain order entered May 25, 1932, and determining a deficiency in income and profits taxes for the fiscal year ending April 30, 1925, against your petitioner, in the sum of $20,657.41. [32]

This Petition is filed in pursuance of the provisions of Section 1001 of the Act of Congress approved on the 26th day of February, 1926, entitled the Revenue Act of 1926, as amended by the Revenue Act of 1928 and the Revenue Act of 1932.

II.

Your petitioner is a corporation organized and existing under and by virtue of the laws of the State of California, having its principal office and place

of business in the City and County of San Francisco, State of California;

For the fiscal year ending April 30, 1926, Zellerbach Paper Company, of which your Petitioner was and is a subsidiary, filed a consolidated income tax return, on behalf of the said Zellerbach Paper Company, the Sanitary Products Corporation, and your Petitioner, on the 15th day of July, 1925, with the Collector of Internal Revenue for the First District of California, whose office was and is located in the City and County of San Francisco, State of California.

III.

Nature of Controversy.

The nature of the controversy is as follows:

The period involved is the fiscal year ended April 30, 1925. For this period respondent proposes that a deficiency of $20,657.41 be assessed against petitioner.

The Petitioner has conceded that the commissioner [33] may proceed to assess and collect this amount as a deficiency unless the three year period of limitation, provided by the Revenue Act of 1926, applies and began to run on July 15, 1925, the date on which the first return was filed.

On that date, to-wit; July 15, 1925, Zellerbach Paper Company filed a consolidated income tax return under the Revenue Act of 1924, on behalf of itself and its affiliated corporations, among them being petitioner herein, with the Collector of Internal Revenue in San Francisco. The Revenue

Act of 1924 provided for a tax of twelve and one-half (12½%) per cent on the net income of corporations and in the return filed on July 15, 1925 the tax was computed on that basis and the sum shown to be due, to-wit: $158,374.05 was thereafter assessed by the Commissioner and paid. This return was neither false nor fraudulent, nor was it filed with intent to evade the tax rightfully due, or any part thereof.

Thereafter and on February 26, 1926, the Revenue Act of 1926 was adopted. It provided for a tax of thirteen (13%) per cent on the net income of corporations for the calendar year of 1925, (and for thirteen and one-half (13½%) per cent thereafter) in lieu of the twelve and one-half (12½%) per cent tax imposed for the same period, by the Revenue Act of 1924. [34]

After the enactment of the 1926 Act the Commissioner furnished Zellerbach Paper Company, parent corporation of petitioner, with a copy of Treasury Decision 3843, which provided that any corporation becoming liable for an additional tax under the 1926 Act should file a new return, and furnished the said Zellerbach Paper Company with a form designated as "U. S. Internal Revenue Form 1120A, Revised April 1926."

The Zellerbach Paper Company filled in the heading of this form, copied into it from the original return filed on July 15, 1925, the figures under the heading "Computation of Tax", computed the additional tax due, executed the document by its Vice President and Assistant Secretary, and paid

$2,111.65 the additional tax shown to be due. This return was filed with, and the additional tax was paid to, the Collector of Internal Revenue in San Francisco, on May 14, 1926.

The return, upon its receipt by the Government, was designated as an amended return. Further evidence of its having been received as an amended return is found in a notation made upon the return itself, to-wit; "See original return".

A sixty day letter was issued to petitioner under date of October 10, 1928, and within sixty days thereafter petitioner appealed to the United States Board of Tax [35] Appeals and thereafter filed its amended petition setting up as a defense the statute of limitations. Prior thereto the amount of deficiency was stipulated, petitioner reserving the defense of the statute of limitations.

The statute of limitations under the 1924 Act is four years (Sec. 277 (a)); under the 1926 Act, three years (Sec. 277 (a) (1)).

On appeal to the Board of Tax Appeals, the final administrative agency of the Executive branch of the government, said Board upheld the position of the Commissioner and held that the return filed on May 14, 1926, was the original return required under the 1926 Act to start the running of the three year statutory period, and that as the deficiency letter was mailed within three years of that date, to-wit: on October 10, 1928, it was mailed within the time required by law, and that the petitioner was liable for a deficiency of $20,657.41.

There are two questions involved:

First: Does the four year statute as provided in the 1924 Act apply, or does the three year period under the 1926 Act apply?

Second: Did the statutory period (whether three years or four years) begin to run with the filing of [36] the original return by the Zellerbach Paper Company on behalf of itself and subsidiaries, or only at the time of the filing of the amended return?

IV.

Assignments of Error.

The Petitioner states that in the record and proceedings before the Board of Tax Appeals, and in the decision and the final order of redetermination rendered and entered by the Board of Tax Appeals, manifest error occurred which intervened to the prejudice of the Petitioner and the Petitioner assigns the following errors, and each of them, which it avers, occurred in said record, proceedings, decision and final order of redetermination, and upon which it relies to reverse said decision and final order of redetermination so rendered and returned by the Board of Tax Appeals, to-wit:

(a) The Board of Tax Appeals erred in holding that the collection of the deficiency in question was not barred by the statute of limitations;

(b) The Board of Tax Appeals erred in holding that the statute of limitations began to run only with the filing of the return on May 14, 1926;

(c) The Board of Tax Appeals erred in not holding that the three year period of limitation

commenced to run [37] from the filing of the original return on July 15, 1925;

(d) The Board of Tax Appeals erred in not holding that the return filed on May 14, 1926 was merely an amended return;

(e) The Board of Tax Appeals erred in not holding that the three year period of limitations began to run from the filing of the original return, even though an amended return was filed on May 14, 1926;

(f) The Board of Tax Appeals erred in making the following statement in its opinion, which statement is not supported by the evidence;

"We agree with the Commissioner that the return filed May 14, 1926, was the original return required under the 1926 Act to start the three year period of section 277 (a) (1)."

(g) The Board of Tax Appeals erred in finding a deficiency against the Petitioner for the fiscal year ending April 30, 1925, in the sum of $20,657.41.

(h) The Board of Tax Appeals erred in rendering decision for respondent.

WHEREFORE, your petitioner prays:

(1) That this Honorable Court review the decision of the United States Board of Tax Appeals.

(2) That the transcript of the record be prepared in accordance with the law and with the rules [38] of this Honorable Court, and transmitted to the Clerk of this Court for filing.

(3) That appropriate action be taken by this Honorable Court to the end that the errors complained of may be reviewed and corrected.

(4) For such other and further relief as to this Honorable Court may seem fit and proper.

NATIONAL PAPER PRODUCTS COMPANY,
By THOMAS McLAREN,
Vice-President.
JOHN FRANCIS NEYLAN,
J. PAUL MILLER,
Attorneys for Petitioner,
1 Montgomery Sreet,
San Francisco, California. [39]

State of California,
City and County of San Francisco.—ss.

Thomas McLaren, being first duly sworn, deposes and says:

That he is the Vice-President of National Paper Products Company, the Petitioner in the above entitled matter; that he has read the same and knows the contents thereof; that the same is true of his own knowledge, except those matters which are therein alleged on information or belief, and that as to those matters he believes it to be true; that the said Petition is filed in good faith, and not for the purpose of delay.

THOMAS McLAREN.

Subscribed and sworn to before me this 21st day of October, 1932.

[Seal] JAMES F. McCUE,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: United States Board of Tax Appeals. Filed November 1, 1932. [40]

[Title of Court and Cause.]

NOTICE OF FILING OF PETITION FOR REVIEW.

To: C. M. Charest, Esq.,
General Counsel,
Bureau of Internal Revenue,
Washington, D. C.
Attorney for Respondent.

PLEASE TAKE NOTICE that the above named Petitioner did, on the 1st day of November, 1932, file with the United States Board of Tax Appeals a Petition for Review of the decision of said Board in the above entitled cause by the United States Circuit Court of Appeals for the Ninth Circuit, a copy of which said Petition for Review is herewith served upon you.

JOHN FRANCIS NEYLAN,
J. PAUL MILLER,
Attorneys for Petitioner,
1 Montgomery Street,
San Francisco, California.

Service of the foregoing notice and service of a copy of the Petition for Review mentioned in said Notice, is hereby accepted this 1st day of November, 1932.

C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue,
Attorney for Respondent.

[Endorsed]: United States Board of Tax Appeals. Filed Nov. 1, 1932. [41]

TREASURY DEPARTMENT.
INTERNAL REVENUE SERVICE.

San Francisco, Calif.

Office of the Collector
First District of
California
In Reply Refer to
Room 109—FFL

Gentlemen:

It is noted that the income tax returns for your corporation are filed on a fiscal year basis therefore the following is submitted for your information, in regard to time for filing new returns and paying additional tax under the Revenue Act of 1926 for corporations with fiscal years ending in 1925.

(T.D. 3843)

"Any corporation which has filed a return for a fiscal year ending in 1925 and paid or become liable for a tax computed under the Revenue Act of 1924, and is subject to additional tax for the same period under the Revenue Act of 1926, must file a new return covering such additional tax on or before May 15th, 1926. Payment of the additional tax may be made at the time the return is filed or if installment payments are desired, such installments must be paid at the time they would be

due if based upon a return for the fiscal year ended February 28th, 1926."

D. H. BLAIR,
Commissioner.

You should give this matter your immediate attention.

Respectfully,
JOHN P. McLAUGHLIN,
Collector.

JPMcL/FEL [42]

[Endorsed]: U. S. Board of Tax Appeals. Div. 9. Docket 41758-41759. Admitted in Evidence June 10, 1931. Petitioner's Exhibit 3.

(642M)

TREASURY DEPARTMENT
Washington

Office of
Commissioner of Internal Revenue

Address Reply to
Commissioner of Internal Revenue
and Refer to
Zellerbach Paper Company,
534 Battery Street,
San Francisco, California.

Sirs:

In accordance with Section 274 of the Revenue Act of 1926 you are advised that the determination of your tax liability for the years 1924, 1925 and 1926 discloses a deficiency of $22,461.95 for the years 1924 and 1925 and an overassessment of $2,328.06

for the year 1926 as shown in the attached statement.

The section of the law above mentioned allows you to petition the United States Board of Tax Appeals within sixty days from the date of the mailing of this letter for a redetermination of your tax liability. However, if you acquiesce in this determination, you are requested to execute the enclosed Form 866 and forward both original and duplicate to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7.

Respectfully,
D. H. BLAIR,
Commissioner.
By C. B. ALLEN,
Deputy Commissioner.

Enclosures:
Statement
Form 866
Form 882

Schedules 1 to 35 inclusive.

[Endorsed]: U. S. Board of Tax Appeals Div. 9 Docket 41758-41759 Admitted in Evidence June 10, 1931. Petitioner's Exhibit 4. [43]

IT:AR:D:60D
CAM

STATEMENT OF RETURNS EXAMINED AND RESULTING TAX LIABILITY

Company	Fiscal Years	Forms	Deficiency in Tax	Over-assessment
Zellerbach Paper Company San Francisco, California.	April 30, 1924	1120 A. Cons.	$14,860.40	
	1925	1120 A. Cons.	7,601.55	
	1926	*		2,328.06
National Paper Products Company, San Francisco, California.	1924	#	14,649.82	
	1925	#	20,657.40	
	1926	*		11,849.04

* Income consolidated with return filed by Zellerbach Corporation, San Francisco, California.

Income consolidated with return filed by Zellerbach Paper Company, San Francisco, California.

The adjustments producing the above-stated results are the same as shown in Bureau letter dated August 31, 1928 and are shown in the attached Schedules 1 to 35, inclusive.

Certificates of Overassessments for the amounts shown above will be issued through the office of the Collector of Internal Revenue for your district and will be applied by that official in accordance with the provisions of Section 284 (a) of the Revenue Act of 1926.

A carbon of this letter has been mailed to John Francis Neylan in accordance with the authorization contained in your power of attorney running to him. [44]

Zellerbach Paper Company. Year ended April 30, 1924.

SCHEDULE 1

Net Income

Net income as disclosed by return		$432,957.61
As corrected		550,939.61
Net adjustment		$117,982.00
Unallowable deductions and additional income:		
(a) Bad Accounts	$81,312.68	
(b) Auto Insurance	5,055.10	
(c) Depreciation	47,429.00	
Total		133,796.78
Nontaxable income and additional deductions:		
(d) Oregon State Income Tax	$ 202.59	
(e) Appreciation	15,612.19	
Total		15,814.78
Net adjustment as above		$117,982.00

Zellerbach Paper Company. Year ended April 30, 1924.

SCHEDULE 2

Explanation of Items Changed

(a) Bad accounts claimed on return over book deduction		$81,312.68
Decrease reserve for losses claimed		3,917.45
Total		$85,230.13
Reserve April 30, 1923	$73,043.22	
Reserve April 30, 1924	69,125.77	
Decrease		3,917.45
Excess deduction (Double deduction		$81,312.68

Schedule 2
(Continued)

(b) Charges to reserve for auto insurance included in adjustment on return restoring increase to reserve of $2,075.71 constitutes a double deduction.		
Proof—Reserve 4/30 - 1924		$18,401.92
4/30 - 1923		16,326.21
Net increase		$ 2,075.71
(c) Depreciation corrected:		
Machinery, etc. 4/30/23	$379,229.77 at 8%	$30,338.39
Additions, 1924	37,870.84 at 4%	1,514.83
Buildings (10 year lease)	34,961.32 at 10%	3,496.13
Automobiles claimed on books (No Change)		32,062.50
Total allowed		$67,411.85

Zellerbach Paper Company. Year ended April 30, 1924.

Schedule 2
(Continued)

Claimed on return		$72,686.44
Add: Error on return:		
Depreciation on books	$ 70,420.89	
Less - Restored on return	28,266.48	42,154.41
Total on return		$114,840.85
Allowed as above		67,411.85
Disallowed net		$ 47,429.00

(d) Oregon State income tax is allowable deduction.

(e) Appreciation of Assets is not taxable income. [46]

SCHEDULE 3

Net Income

National Paper Products Company

Net Income as disclosed by return		$643,755.67
As corrected		759,215.79
Net adjustment		$115,460.12
Unallowable deductions and additional income:		
(a) Bad accounts	$23,519.40	
(b) Depreciation	91,940.72	
Net adjustment as above		$115,460.12

SCHEDULE 4

Explanation of Items Changed

(a) Bad accounts claimed on return over book deduction	$ 23,519.40
Decrease reserve for losses claimed	30.32
Total	$ 23,549.72

Zellerbach Paper Company. Year ended April 30, 1924.

Schedule 4
(Continued)

Reserve April 30, 1923	$25,453.69	
April 30, 1924	25,423.37	
Decrease		30.32
Excess deduction (Double deduction		$ 23,519.40
(b) Depreciation Corrected:		
Machinery and Equipment:		
San Francisco - 4/30/23	$ 193,653.36 at 8%	$ 15,492.27
Additions 1924	(14,242.54 at 4%	(569.70)
Stockton, Los Angeles & H.Q. 4/30/23	$1,329,940.28 at 8%	106,395.22
Additions 1924	713,232.07 at 4%	28,529.28
Carthage - 4/30/23	703,350.46 at 8%	56,268.04
Additions 1924	65,059.38 at 4%	2,602.37
Buildings Stockton 4/30/23	1,050,699.98 at 2½%	26,267.50
Additions 1924	126,031.53 at 1¼%	1,575.39
Buildings Carthage - 4/20/23	346,863.90 at 2½%	8,671.60
Additions 1924	5,312.30 at 1¼%	66.40
Automobiles claimed (No Change)		5,233.54
Total Allowable		$250,531.91

Zellerbach Paper Company. Year ended April 30, 1924.

Schedule 4
(Continued)

(b) Continued.		
Claimed on return		$310,027.47
Add - Error on return:		
Depreciation on books	$269,280.99	
Less - Restored on return	236,835.83	32,445.16
Total on return		$342,472.63
Allowed as above		250,531.91
Disallowed net		$ 91,940.72

The Sanitary Products Corporation.

Zellerbach Paper Company. Year ended April 30, 1924.

SCHEDULE 5
Net Income

Net loss as disclosed by return		$ 11,344.52
As corrected - net loss		8,704.94
Net adjustment		$ 2,639.58
Unallowable deductions and additional income:		
(a) Reserve for losses	$ 2,396.44	
(b) Depreciation	243.14	
Net adjustment as above		$ 2,639.58

Zellerbach Paper Company. Year ended April 30, 1924.

SCHEDULE 6

Explanation of Items Changed

(a) Increase in reserve for losses increases income accordingly:

Reserve - 4/30/1924	$ 5,127.20
4/30/1923	2,730.76
Net increase	$ 2,396.44
	[48]

(b) Depreciation claimed on machinery $ 1,215.69
Corrected: Average assets, $12,156.92 at 8% 972.55

Net disallowed $ 243.14

Automobiles allowed as claimed.

the importance of the initial computation by the taxpayer.

In the companion case (No. 7209) we have held that a return filed under the Revenue Act of 1918 could not be considered a return under the Revenue Act of 1921, if it did not show the deductions as authorized by the Act of 1921, although in the particular case involved the statutory deduction of $2,000 was the only change made in the return of the particular taxpayer. We have declined with all due respect to follow decisions to the contrary by coordinate courts. These decisions are pressed upon us here as a ground for reversing the action of the Board of Tax Appeals. It is not disputed by the Commissioner that the principle of those decisions is applicable to the case in hand. If by reason of the fact that the Commissioner by a mere computation applied to the return filed under the Revenue Act of 1918 can determine the proper tax levied by the Act of 1921 on petitioner's income, a new return is unnecessary, then a new return is unnecessary in the case at bar. Indeed, the decisions above referred to apply with more force to the case at bar where the only question involved is a matter of computation of a tax at a new rate than to a case where the question under consideration is a deduction which a statute expressly requires be shown by the taxpayer in his return as fixed by the law applicable to the taxation of the income shown in the return.

We base our conclusion in this case on the fact that by the uniform practice of the Treasury De-

partment over a long period of years and by its decisions above referred to as well as by the express terms of the statute a return is required where an additional tax is imposed by the new Revenue Act. Consequently, we hold that regardless of the fact which we deem largely fortuitous that the return filed by the taxpayer in this particular case shows a gross income and a net income which is identical no matter whether the terms of the Revenue Act of 1924 or the terms of the Revenue Act of 1926 are applied, the fact that even in such a case a proper return will show an additional tax properly requires a return fixing the amount of such additional tax. This return was demanded by the Treasury Decisions requested by letter and complied with by the petitioner less than three years before the issuance of the deficiency letter.

We wish to make it clear that unless we are correct in holding that the decisions of our coordinate courts are erroneous this case as well as the companion case should be reversed.

Order affirmed.

(Endorsed): Opinion. Filed Feb. 28, 1934. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit.

No. 7140.

NATIONAL PAPER PRODUCTS COMPANY, a Corporation,

Petitioner,

vs.

GUY T. HELVERING, as Commissioner of Internal Revenue,

Respondent.

JUDGMENT.

Upon Petition to Review an Order of the United States Board of Tax Appeals.

This Cause came on to be heard on the Transcript of the Record from the United States Board of Tax Appeals and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the Order of the said Board of Tax Appeals in this Cause be, and hereby is affirmed.

[Endorsed]: Filed and entered Feb. 28, 1934. Paul P. O'Brien, Clerk.

[Title of Court and Cause—Consolidated Cases.]

APPLICATION FOR STAY OF MANDATE

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Come now the Petitioners above named, by Messrs.

John Francis Neylan and J. Paul Miller, their counsel, and hereby make application to this Honorable Court for its order staying the issuance of the mandate in the above entitled cases until April, 29, 1934.

This application is made to this Honorable Court upon the grounds that an opinion in the above named cases was filed on the 28th day of February, 1934, in accordance with which a Judgment or Decree was, on said day, filed and entered, affirming the Judgment or Decree of the United States Board of Tax Appeals, and because of the said opinion, Judgment or Decree of this Court, the petitioners above named desire and intend to petition the Supreme Court of the United States for its Writ of Certiorari in the above entitled cases, requesting the said Supreme Court of the United States to review the decision of this Honorable Court in said matters, basing their said petition for a Writ of Certiorari upon the fact that there now exists a conflict between the following courts: the Circuit Courts of Appeal for the 5th and 8th Circuits and the Court of Appeals of the District of Columbia, on the one hand, and between this Honorable Court on the other hand, the decision of this Honorable Court in the above entitled cases being at conflict with decisions of the aforementioned courts upon identical legal questions.

Wherefore, Petitioners pray that the mandate of this Honorable Court be stayed as hereinabove applied for.

Dated: San Francisco, California, March 15, 1934.

JOHN FRANCIS NEYLAN
J. PAUL MILLER

[Endorsed]: Filed Mar. 15, 1934. Paul P. O'Brien, Clerk.

[Title of Court and Cause—Consolidated Cases.]

ORDER STAYING ISSUANCE OF MANDATE

Upon application of Messrs. John Francis Neylan and J. Paul Miller, counsel for the petititioner, and good cause therefor appearing, It Is Ordered that the issuance, under Rule 32, of the mandate of this Court in the above cause be, and hereby is stayed to and including April 29, 1934; and in the event the petition for a writ of certiorari to be made by the petitioner herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

CURTIS D. WILBUR
United States Circuit Judge.

Dated: San Francisco, California, March 15, 1934.

[Endorsed]: Filed Mar. 15, 1934, Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

[Title of Cause and Number.]

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, PAUL P. O'BRIEN, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred and fourteen (114) pages, numbered from and including 1 to and including 114, to be a full, true and correct copy of the entire record, excluding original exhibits transmitted herewith, of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the petitioner, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 27th day of March, A. D. 1934.

[Seal] PAUL P. O'BRIEN,
Clerk.

[fol. 116] In United States Circuit Court of Appeals for the Ninth Circuit

Nos. 7140, 7211

National Paper Products Company, a Corporation,

vs.

Commissioner of Internal Revenue

Nos. 7141, 7209

Zellerbach Paper Company, a Corporation,

vs.

Commissioner of Internal Revenue

No. 7210

Zellerbach Paper Company, as Transferee of A. S. Hopkins Company,

vs.

Commissioner of Internal Revenue

Order Staying Issuance of Mandates—Filed April 27, 1934

Upon application of Mr. John Francis Neylan, counsel for the petitioners, and good cause therefor appearing, it is ordered that the issuance, under Rule 32, of the mandate of this Court in each of the above causes be, and hereby is stayed to and including May 10, 1934; and in the event the petitions for writs of certiorari to be made by the petitioners herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandates of this Court are to be stayed until after the said Supreme Court passes upon the said petition.

Francis A. Garrecht, United States Circuit Judge.

Dated San Francisco, California, April 27, 1934 .

A true copy. Attest: April 28, 1934.
Paul P. O'Brien, Clerk. (Seal United States Circuit Court of Appeals, Ninth Circuit.)

[fol. 117] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 4, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934

No. 36

ZELLERBACH PAPER COMPANY, PETITIONER,

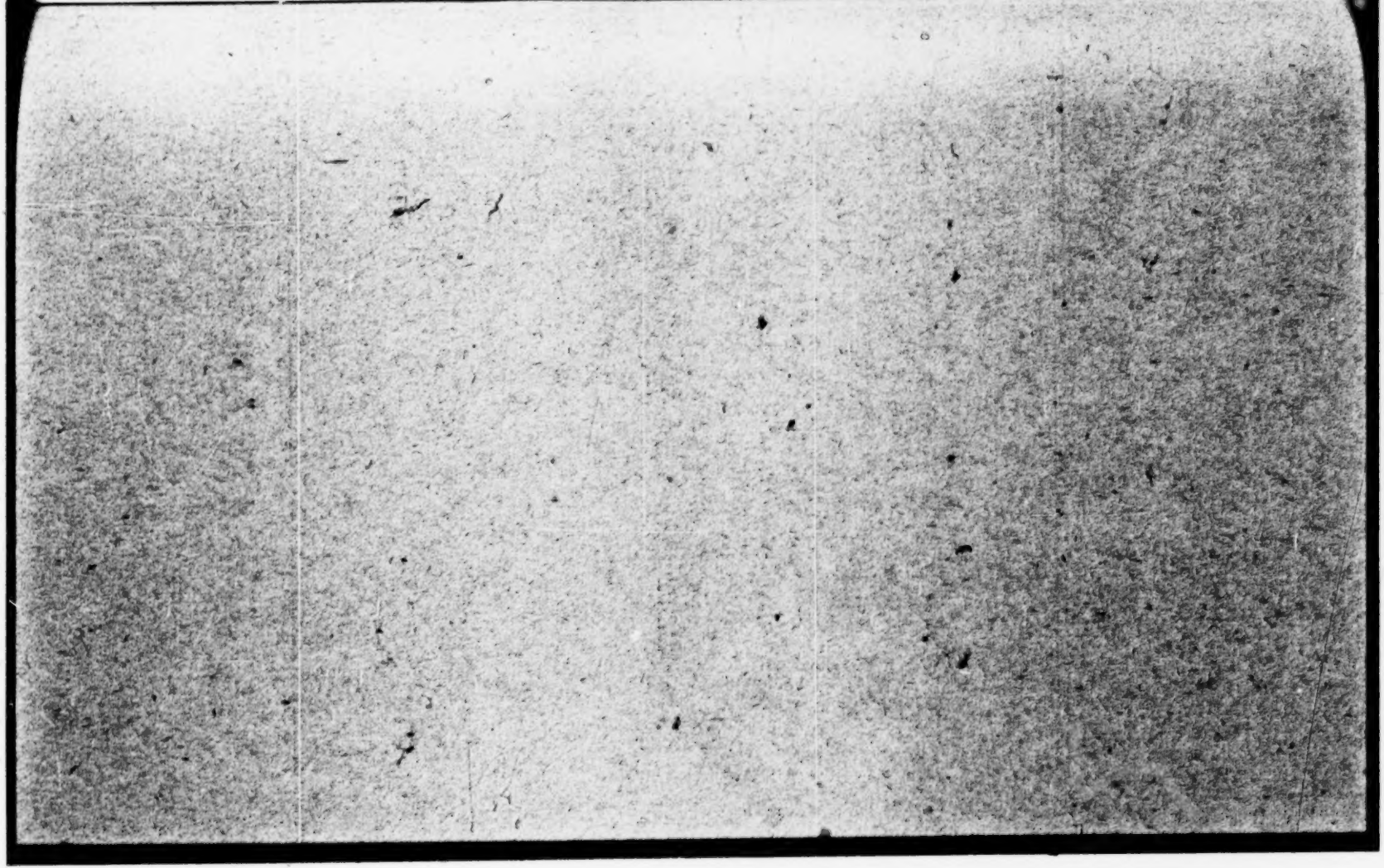
vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 10, 1934

CERTIORARI GRANTED JUNE 4, 1934



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 36

ZELLERBACH PAPER COMPANY, PETITIONER,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 27, 1934

—5127-C

APPEARANCES.

For Taxpayer:

JOHN F. NEYLAN, Esq.,
J. P. MILLER, Esq.,
W. C. MAGATHAN, Esq.,

For Comm'r:

H. A. COX, Esq.,
F. R. SHEARER, Esq., and
T. CALLAHAN, Esq.

Docket No. 41759

ZELLERBACH PAPER COMPANY,
a Corporation,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES.

Transferred to Mr. Murdock 3/28/32.

1928

Dec. 6—Petition received and filed. Taxpayer notified. (Fee paid)

" 7—Copy of petition served on General Counsel.

" 29—Motion to consolidate for hearing with dockets 35599 and 41758, filed by taxpayer.

1929

Jan. 21—Answer filed by General Counsel.

" 23—Copy of answer served on taxpayer. Circuit Calendar.

" 28—Motion of December 29 to consolidate, granted.

1931

Mar. 11—Motion to segregate from docket 35599 but to remain consolidated with docket 41758 filed by taxpayer. 3/13/31 granted.

Apr. 24—Hearing set June 10, 1931, at Oakland, California.

Jun. 10—Hearing had before E. H. Van Fossan, Div. 9 on merits. Amended petition filed—amended answer dictated into record. Copy served. Briefs due in 60 days.

Jul. 10—Motion for extension of 30 days to file answer to amended petition filed by General Counsel.

" 13—Transcript of hearing of June 10, 1931 filed.

" 13—Motion for extension of time to answer granted.

" 25—Answer to amended petition filed by General Counsel.

Aug. 3—Motion for 30 days to file brief, filed by taxpayer.

" 7—Motion for 60 days to file brief filed by General Counsel. 8/11/31 granted.

" 10—Order allowing petitioner until Sep. 8, 1931 to file brief entered.

1931

Sep. 7—Motion for extension to Oct. 7, 1931 to file brief filed by taxpayer. 9/10/31 granted.

Oct. 3—Brief filed by General Counsel.

" 8—Brief filed by taxpayer.

1932

May 17—Findings of fact and opinion rendered, John E. Murdock, Div. 3. Judgment will be entered for respondent.

" 19—Decision entered, Div. 3.

" 21—Notice of appearance of J. Paul Miller as counsel for taxpayer filed.

" 25—Order that decision entered 5/19/32 be amended as per this order entered. [1*]

Nov. 1—Supersedeas bond in the amount of $41,500.00 approved and ordered filed.

" 1—Petition for review by U. S. Circuit Court of Appeals (9) with assignments of error filed by taxpayer.

" 1—Proof of service filed by taxpayer.

" 23—Praecipe filed.

" 23—Proof of service filed.

" 28—Statement of evidence lodged.

" 28—Notice of lodgment of statement and of hearing Dec. 8, 1932 to approve statement filed.

" 29—Notice of change of hearing date from Dec. 8 to Dec. 7, 1932.

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*Page numbering appearing at the foot of page of original certified Transcript of Record.

1932

Dec. 6—Objections to statement of evidence filed by General Counsel.

" 7—Hearing had before Mr. Murdock, Div. 3, on approval of statement of evidence. On respondent's motion, continued to Dec. 28, 1932.

" 7—Order continuing to Dec. 28, 1932, entered.

" 19—Copy of order from 9th Circuit enlarging time to Jan. 30, 1933 to file transcript filed.

" 20—Proof of service of objections filed by General Counsel.

" 28—Hearing had before Mr. Sternhagen, Div. 10, on approval of statement of evidence. On petitioner's motion continued to Jan. 11, 1933.

" 28—Order continuing to Jan. 11, 1933, for hearing on approval of statement of evidence entered.

1933

Jan. 7—Order from Circuit Court of Appeals (9) to transmit petitioner's Exhibits numbers 1 and 2 in original form, filed.

" 11—Hearing had before C. R. Arundell, Div. 7 on approval of statement of evidence—continued to Jan. 25, 1933.

" 11—Motion to postpone hearing filed by taxpayer—granted to 1/25/33.

" 23—Copy of order from 9th Circuit enlarging time to March 3, 1933 to file transcript filed.

1933

Jan. 25—Hearing had before Mr. Marquette on approval of statement of evidence. On motion of petitioner, continued to 2/15/33.

Feb. 15—Agreed statement of evidence approved and ordered filed.

" 15—Hearing had before Mr. Murdock on approval of statement of evidence. Agreed statement filed.

" 27—Copy of order from 9th Circuit for extension to April 3, 1933 to file transcript, of record filed.

Mar. 3—Copy of order from 9th Circuit for consolidation with docket 41758 filed. [2]

United States Board of Tax Appeals

Docket No. 41759

ZELLERBACH PAPER COMPANY,
a corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION.

The above named Petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:AR:D:60D:CAM) dated October 10,

1928, and as a basis for its proceeding alleges as follows:

1. The Petitioner is a corporation organized under the laws of the State of California, and having its principal place of business at 534 Battery Street, San Francisco, California.

2. The notice of deficiency (a copy of which is attached and marked Exhibit "A") was mailed to the Petitioner on October 10, 1928.

3. The taxes in controversy are income taxes for the fiscal year ended April 30, 1925, and for Seven Thousand, Six Hundred and One and 55/100 Dollars ($7,601.55).

The above total deficiency is based upon certain [3] adjustments made by the Commissioner of Internal Revenue. Included in these adjustments is the following addition to the net income of the taxpayer as shown in Schedule 16, page 19, of Treasury Department letter dated October 10, 1928, as follows:

"(d) Depletion claimed	$34,492.50
Corrected 3,679.20 cords at $4.12 in accordance with Engineers report for prior years	$15,158.30
Net disallowed	$19,334.20"

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) The Commissioner erred in determining the deficiency set forth in his Sixty Day Letter dated October 10, 1928, in respect of the taxes sought to be assessed for the fiscal year ended April 30, 1925, in that the Commissioner refused to allow a depletion rate of $9.375 per cord of timber.

5. The facts upon which the Petitioner relies as the basis of this proceeding are as follows:

Petitioner, in making its income tax return for the fiscal year ended April 30, 1925, claimed depletion on certain timber owned by it in the aggregate sum of $34,492.50. This total sum was made up by adopting a depletion rate of $9.375 per cord on a total of 3,679.24 cords.

The Commissioner allowed a depletion rate on said 3,679.24 cords at the rate of $4.12 per cord, the total amount [4] of depletion, as per Treasury Department letter hereinabove referred to amounting to $15,158.30.

This constituted a reduction of the total amount of depletion claimed by taxpayer to $19,334.20 and resulted in adding the sum of $19,334.20 to the income of the taxpayer for the fiscal year ended April 30, 1925.

The taxpayer contends that a depletion rate of $9.375 per cord is the correct rate of depletion, and that depletion in the total sum of $34,492.50 should be allowed for the period in question.

WHEREFORE the Petitioner prays that when and if the Respondent hereinabove named shall file an answer to this petition, said Board shall set said

matter for hearing, and upon a hearing thereof, the Board shall find that the taxpayer was and is entitled to a depletion rate of $9.375 per cord on 3,679.20 cords, and is entitled to a total depletion in the sum of $34,492.50, and further that said Board find that the return of the taxpayer filed herein for the fiscal year ended April 30, 1925 (except as to changes heretofore proposed by the Commissioner, in which suggested changes the taxpayer has acquiesced), be found to be correct. The Petitioner further prays for such other relief as the nature of the case may require and which the Board may deem equitable and proper in the premises.

JOHN FRANCIS NEYLAN
Counsel for Petitioner, 901 Crocker
First National Bank Bldg.,
San Francisco, Calif. [5]

State of California
City and County of San Francisco.—ss.

I. Zellerbach, being duly sworn, says that he is the President of Zellerbach Paper Company, and that he is duly authorized to verify the foregoing petition and is familiar with the statements contained therein, and that the facts are true, except as to those facts stated to be upon information and belief, and those facts he believes to be true.

[Seal] I. ZELLERBACH.

Subscribed and sworn to before me this Third day of December, 1928.

[Seal] LULU A. GODSIL

Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires September 13, 1931. [6]

[Exhibit "A" referred to is set forth on pages ..... to ....., and is not printed here solely to avoid duplication and expense.]

[Title of Court and Cause.]

ANSWER

The Commissioner of Internal Revenue by his attorney, General Counsel, Bureau of Internal Revenue, for answer to the petition filed by the above-named petitioner, admits and denies as follows:

1. Admits all the material allegations contained in paragraph 1 of the petition.

2. Admits that the deficiency letter was mailed to the petitioner on October 10, 1928, but denies that a true copy of said deficiency letter is attached to the petition as alleged in paragraph 2 of the petition.

3. Denies all the material allegations contained in paragraph 3 of the petition, except the allegation that the tax in controversy is income tax for the fiscal year ended April 30, 1925, in the amount of $7,601.55.

4-(a). Denies that the respondent committed error in the determination of the deficiency as alleged

in paragraph 4 of the petition.

4-(b). Denies that any error was made in the determination of the deficiency referred to in deficiency letter dated October 10, 1928.

5. Denies all the material allegations contained in paragraph 5 of the petition. [25]

6. Denies generally and specifically each and every allegation in the petitioner's petition contained not hereinbefore admitted, qualified or denied.

WHEREFORE, it is prayed that the petitioner's appeal be denied.

(Signed) C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
J. ARTHUR ADAMS,
Special Attorney,
Bureau of Internal Revenue.

[Endorsed] United States Board of Tax Appeals. Filed Jan. 21, 1929. [26]

[Title of Court and Cause.]

AMENDED PETITION

Now comes the above named petitioner and amends its Petition heretofore filed in the above entitled matter and hereby petitions for a re-determination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:AR:D:60D:CAM) dated October 10th, 1928, and as a basis for its proceeding alleges as follows:

1. The Petitioner is a corporation organized under the laws of the State of California, and having its principal place of business at 534 Battery Street, San Francisco, California.

2. The notice of deficiency, a copy of which was attached to the original petition filed herein and marked Exhibit "A", and which is incorporated herein by reference thereto, was mailed to the petitioner on October 10, 1928.

3. The taxes in controversy are income taxes for the fiscal year ended April 30, 1925, and for Seven Thousand Six Hundred and One and 55/100 ($7,601.55) Dollars. [27]

4. The determination of tax as set forth in the said notice of deficiency is based upon the following errors:

(a) The Commissioner erred in determining the deficiency set forth in his sixty day letter dated October 10th, 1928 in relation to taxes due for the fiscal year ended April 30, 1925 by reason of the fact that the assessment of any additional taxes for said fiscal year and the collection of any additional taxes for said fiscal year and any proceedings in relation thereto were and are barred by the Statute of Limitations in force and effect at the time of the mailing of the deficiency letter dated October 10, 1928, and prior thereto and now in force and effect, and particularly by reason of the provisions of the Revenue Act of 1926 and more specifically Section 277(a)(1) thereof; also by reason of the provisions of the Revenue Act of 1928 and particularly Section 1 thereof.

5. The facts upon which the petitioner relies as a basis of this proceeding are as follows:

(a) Petitioner filed a consolidated income tax return on behalf of itself and its subsidiaries National Paper Products Company and the Sanitary Products Corporation on the 15th day of July, 1925; that said return was full and complete and had attached thereto all necessary schedules to enable the Commissioner of Internal Revenue to determine the tax due from said petitioner and its subsidiaries; that said return was filed in strict compliance [28] with the Revenue Act of 1924 then in force and effect, and that said return was neither false nor fraudulent.

(b) Said return was thereafter examined by the Commissioner of Internal Revenue and the tax reported therein, to-wit, the sum of One Hundred and Fifty Eight Thousand Three Hundred and Seventy Four and 05/100 ($158,374.05) Dollars, was thereafter assessed against this Petitioner by the said Commissioner and that thereafter the said tax was paid, said payments occurring on the following dates:

July 15, 1925, $39,593.51;
October 16, 1925, $39,593.52;
January 16, 1926, $39,593.51;
April 16, 1926, $39,593.51.

(c) That on the 26th day of February, 1926, the the Revenue Act of 1926 theretofore adopted by the Congress of the United States, was approved by the President of the United States. That said Revenue Act of 1926 became effective as of the date of its adoption, to-wit, February 26, 1926, except that certain parts thereof became effective retroactively as

of January 1st, 1925. That by reason of the retroactive provisions of said act increasing the rate of tax upon the net incomes of corporations during the calendar year 1925 from 12½% to 13%, the Commissioner of Internal Revenue issued Treasury Decision No. 3843 on the 28th day of February, 1926. That after the promulgation of the Treasury Decision No. 3843 [29] as above set forth, a copy of same was mailed to this Petitioner, by the Collector of Internal Revenue at San Francisco, California, requesting that the filing of an amended income tax return as provided for therein, be given immediate attention.

(d) That after the receipt of a copy of Treasury Decision No. 3843, as aforesaid, this Petitioner on the 14th day of May, 1926, filed with the Collector of Internal Revenue, at San Francisco, California, an amendment to its income tax return theretofore filed, wherein there was set forth the amount of tax originally reported in its income tax return and the additional amount of tax due by reason of the increase in rate from 12½% to 13% as provided in the Revenue Act of 1926; that the amount of tax reported therein was Two Thousand One Hundred and Eleven and 65/100 Dollars ($2,111.65), and on the 15th day of May, said additional tax was paid. That no schedules of any kind or character were attached to the amendment to the income tax return filed as aforesaid and no data were set forth therein except as hereinabove set forth.

(e) That the deficiency letter from which this appeal has been taken was mailed to the Petitioner

on October 10, 1928; that the Revenue Act of 1926, and particularly Section 277 (a) (1) governs the time within which an additional assessment may be made against this Petitioner for its fiscal year ended April 30, 1925; that [30] the period of time set forth in said act is three years; that more than three years elapsed between the date of the filing of its original income tax return on July 15, 1925 and the date of the issuance of the sixty day letter on October 10, 1928. That by reason of the facts set forth herein, said Commissioner is barred from assessing and/or collecting any additional taxes from this Petitioner for the fiscal year ended April 30th, 1925.

WHEREFORE, the Petitioner prays that upon a hearing of the above entitled matter the Board shall find that there are no additional taxes due from this Petitioner nor either or any of its subsidiaries for the fiscal year ended April 30th, 1925, further that said Board shall find that the assessment and the collection of any additional taxes from this Petitioner and/or either or any of its subsidiaries is barred by the Statute of Limitations and particularly by reason of the provisions of the Revenue Act of 1926. The Petitioner prays for such further and other relief as the nature of the case may require and which the Board may deem equitable and proper in the premises.

JOHN FRANCIS NEYLAN,
Counsel for the Petitioner,
901 Crocker First National Bank Bldg.
San Francisco, California [31]

State of California,
City and County of San Francisco.—ss.

S. Sonnenberg, being duly sworn, says that he is the Treasurer of Zellerbach Paper Company, and that he is duly authorized to verify the foregoing petition, and is familiar with the statements contained therein, and that the facts are true, except as to those facts stated to be upon information and belief, and those facts he believes to be true.

S. SONNENBERG.

Subscribed and sworn to before me this Ninth day of June, 1931.

(Seal) LULU A. GODSIL,
Notary Public in and for the City and County of San Francisco, State of California.

My commission expires September 13, 1931.

[Endorsed]: United States Board of Tax Appeals. Filed at hearing June 10, 1931. [32]

[Title of Court and Cause.]

ANSWER TO AMENDED PETITION.

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the amended petition of the above-named taxpayer, admits and denies as follows:

(1) Admits the allegations of paragraph 1 of the amended petition.

(2) Admits the notice of deficiency was mailed to the petitioner on October 10, 1928.

(3) Admits the allegations of paragraph 3 of the amended petition.

(4) Denies the respondent erred in the determination of the deficiency and specifically denies that the respondent erred in the respects alleged in paragraph 4 (a) of the amended petition.

(5) (a) Admits petitioner filed a consolidated income tax return on behalf of itself and its subsidiaries National Paper Products Company and the Sanitary Products Corporation on the 15th day of July, 1925.

Admits that said return was filed under the provisions of the Revenue Act of 1924, then in force and effect, and further admits that said return was not a false or fraudulent return filed with intent to evade tax.

(b) Admits that after the filing of said return on July 15, 1925, the Commissioner duly assessed the tax shown thereon to be due, in the amount of $158,374.05. [33]

(c) Admits the first two sentences contained in subparagraph (c) of paragraph 5 of the amended petition; admits that on or about the 28th day of February, 1926, the Commissioner with the approval of the Secretary of the Treasury, issued Treasury Decision Number 3843; admits the allegations contained in the last sentence of subparagraph (c) of paragraph 5 of the amended petition.

(d) Admits that after the receipt of a copy of Treasury Decision 3843, petitioner filed a return on Form 1120-A under the provisions of the Revenue Act of 1926, and reported thereon additional tax due

in the amount of $2,111.65, which amount was thereafter duly assessed; admits that no schedules of any kind or character were attached to said last mentioned returns, and that no data was set forth therein except the insertion in line 25 of the same amount of net income, namely, $1,266,992.39, being the same amount of net income as disclosed on the consolidated return filed July 15, 1925.

(e) Admits that the deficiency letter from which this appeal has been taken was mailed to the petitioner on October 10, 1928.

Respondent denies each and every allegation contained in said amended petition except as hereinabove admitted or qualified.

WHEREFORE, it is prayed that the appeal be denied.

(Signed) C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:

HENRY A. COX,
Special Attorney,
Bureau of Internal Revenue.

[Endorsed]: United States Board of Tax Appeals. Filed Jul. 25, 1931. [34]

[Title of Court and Causes—Docket Nos. 41758, 41759.]

FINDINGS OF FACT AND OPINION.

Promulgated May 17, 1932.

The statutory period of limitation for assessment had not run on October 10, 1928, where a return for a fiscal year ended April 30, 1925 was filed pursuant to the 1924 Act on July 15, 1925, and a return for the same period showing increased tax was filed pursuant to the 1926 Act and T. D. 3843 on May 14, 1926.

John Francis Neylan, Esq., for the petitioners.

H. A. Cox, Esq., and F. R. Shearer, Esq., for the respondent.

The Commissioner determined the following deficiencies for the fiscal year ended April 30, 1925:

Zellerbach Paper Company	$ 7,601.55
National Paper Products Company	20,657.40

The only assignment of error is that the statute of limitations had barred assessment and collection of any additional taxes for this fiscal year prior to the day on which the notice of deficiency was mailed.

FINDINGS OF FACT.

The two petitioners are California corporations having their principal place of business in San Francisco.

On July 15, 1925 Zellerbach Paper Company filed a consolidated income tax return on behalf of itself and its subsidiaries National [35] Paper Products Company and Sanitary Products Corporation, un-

der the provisions of the Revenue Act of 1924. It included the income of all three companies. This was not a false or fraudulent return filed with intent to evade tax. The amount of tax shown to be due on this return, to-wit, $158,374.05, was duly assessed by the Commissioner. This return, as the affidavit states, was a return made pursuant to the Revenue Act of 1924.

The Revenue Act of 1926 was approved February 26, 1926. On February 28, 1926 the Commissioner of Internal Revenue issued Treasury Decision 3843 which was as follows:

> Any corporation which has filed a return for a fiscal year ending in 1925 and paid or become liable for a tax computed under the Revenue Act of 1924, and is subject to additional tax for the same period under the Revenue Act of 1926, must file a new return covering such additional tax on or before May 15th, 1926. Payment of the additional tax may be made at the time the return is filed or if installment payments are desired, such installments must be paid at the time they would be due if based upon a return for the fiscal year ended February 28th, 1926.

A copy of this decision was mailed to Zellerbach Paper Company by the Collector of Internal Revenue at San Francisco in a letter advising the corporation to give its immediate attention to the matter of filing new returns and paying additional tax

under the Revenue Act of 1926 for its fiscal year ending in 1925.

On May 14, 1925, after the receipt of this letter, the Zellerbach Paper Company filed a return on behalf of itself and its subsidiaries on Form 1120A, showing additional tax due in the amount of $2,111.65. This amount was thereafter duly assessed. This return, as the affidavit states, was a return made pursuant to the Revenue Act of 1926. No schedules were attached to this last mentioned return, and no data [36] were set forth therein except that in line 25 net income of $1,266,992.39 was set forth. This was the same amount of net income shown on the return filed July 15, 1925.

The notice of deficiency was mailed to the petitioners on October 10, 1928.

OPINION.

MURDOCK: The notice of deficiency was sent within four years of the date of filing of the first return, within three years from the date on which the Revenue Act of 1926 was approved, and within three years from the date upon which the last return was filed, but more than three years after the date upon which the first return was filed. The petitioners concede that the Commissioner may proceed to assess and collect the deficiencies unless the three-year period of limitation, provided by the Revenue Act of 1926, applies and began to run on July 15, 1925, the date upon which the first return was filed. [37]

We agree with the Commissioner that the return filed May 14, 1926, was the original return required under the 1926 Act to start the three-year period of section 277 (a) (1). We held in John Wanamaker Philadelphia, 8 B. T. A. 864, and in Hutchinson Company, 14 B. T. A. 367, that a return filed under one act would not start the period of limitation provided in a later act if additional tax was due under the new act for the period covered by the return. Other Board decisions to the same effect are Valentine-Clark Company, 14 B. T. A. 562 (reversed, 52 Fed. (2d) 346); Gus Holstine Dry Goods Company, 16 B. T. A. 1124; Isaac Goldmann Company, 17 B. T. A. 1103 (reversed, 51 Fed. (2d) 427); Myles Salt Company, Ltd., 18 B. T. A. 742 (reversed, 49 Fed. (2d) 232); Adams, Cushing & Foster, Inc., 19 B. T. A. 89; G. Corrado Coal & Coke Interests, Inc., 19 B. T. A. 691; and E. J. Lorie et al., 21 B. T. A. 612. Cf. Hill Goldwater, 21 B. T. A. 73. We refer to our discussion of the question in the cited cases. The circumstances under which the additional tax arises in this case are different from those under which the additional taxes arose in the cases just mentioned, but perhaps the difference is not material. We have, however, some additional reasons for our position not expressed in those cases. We want to again call particular attention to the discussion of a similar issue in United States v. Updike, 1 Fed. (2d) 550, and in Updike v. United States, 8 Fed. (2d) 913 (certiorari denied, 271 U. S. 661), affirming the above decision. [38] That case differs from the

present one only in degree. See also Davis Feed Company, 2 B. T. A. 616 and Covert Gear Co., Inc., 4 B. T. A. 1025.

Perhaps no revenue act specifically required the taxpayer to compute the tax as a part of his return. (See, however, section 240 (a), Revenue Act of 1926). Yet, a study of the various revenue acts, the rules and regulations of the Commissioner, the forms regularly used for making returns, and the way taxpayers themselves have interpreted the laws and regulations in making their returns, shows that a complete return is required and is understood to include a computation of the tax by the taxpayer himself. The acts gave the Commissioner authority to make and publish necessary rules and regulations. He required taxpayers to make their returns on certain forms which he furnished. These are called income tax returns. They provided a place for a computation of the tax by the taxpayer. The tax thus shown to be due on the return becomes due and payable within nine months. No further assessment is necessary. If the Commissioner determines that more tax is due than that shown on the return, he must assess the additional tax within a prescribed time. This is the assessment which must be made within the period of limitation. If Congress has not specifically provided that the taxpayer shall make the computation and show on his return the amount of tax he believes is due, it has at least given clear indication that it intended to impose this duty upon each taxpayer. For example, in section 273

of the Revenue Act of 1926 "deficiency" is defined to be: [39]

> (1) The amount by which the tax imposed by this title exceeds the amount shown as the tax *by the taxpayer* upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax; * * * (Italics ours)

The petitioners did not compute, on the return filed in 1925, the tax which they believed to be due under the 1926 Act. Such a computation was impossible at the filing date. We think Congress intended that each corporation affected by the 1926 Act should file a return after the passage of that act, showing all required information, including the tax it believed to be due, and this return would start the three-year period for assessment. Furthermore, the Commissioner was required to make all needful rules and regulations for the enforcement of the act (section 1101); he required this taxpayer to file a new return; this rule was reasonable; and it must be given the force and effect of law. Maryland Casualty Company v. United States, 251 U. S. 342. The petitioners complied with the law and the ruling by filing the required return on May 14, 1926. Cf. section 1102 (a) and (b). This return, filed under the 1926 Act, could not amend the return filed under

the 1924 Act so that the latter would become a return under the 1926 Act. The petitioners, in filing their return under the 1926 Act, adopted as a part thereof so much of the return theretofore filed under the 1924 Act as was appropriate and useful. There was perhaps no necessity for them to duplicate the computation of net income and the supporting schedules already on file. But they knew that additional tax was due under the new act and they had not [40] made an income tax return under the new act until they filed a return showing what tax they honestly believed was due. The computation under the 1924 Act was quite a different thing from the computation under the 1926 Act as is apparent from an examination of the two returns in evidence in this case. The statutory period for assessment began to run on May 14, 1926 when the original return under the 1926 Act was filed.

Reviewed by the Board.

Judgment will be entered for the respondent.

VAN FOSSAN, dissenting: The principle announced in the decisions of the Board on which the prevailing opinion in these cases is predicated has been considered by the Court of Appeals of the District of Columbia and the Circuit Courts of Appeal in three of the cases cited and in each instance the Board has been reversed. Valentine-Clark Co., 14 B. T. A. 562; reversed, 52 Fed. (2d) 346; Isaac Goldmann Co., 17 B. T. A. 1103; reversed, 51 Fed. (2d) 427; Myles Salt Co., 18 B. T. A. 742; reversed, 49 Fed. (2d) 232. On further consideration of the

merits of the issue involved, I am convinced that the Board has been in error in all of these cases and that the petitioners should prevail.

GOODRICH agrees with this dissent. [41]

United States Board of Tax Appeals
Washington

Docket No. 41759

ZELLERBACH PAPER COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION.

Pursuant to the determination of the Board, as set forth in its report promulgated May 17, 1932, it is

ORDERED and DECIDED: That there is a deficiency of $20,657.40 for the fiscal year ended April 30, 1925.

[Seal] (Signed) J. E. MURDOCK,
Member.

Entered May 19, 1932. [42]

[Title of Court and Cause.]

ORDER.

For good cause, it is

ORDERED that the last paragraph of the decision in this proceeding, entered under date of May 19, 1932, be and hereby is amended to read as follows:

"ORDERED and DECIDED: That there is a deficiency of $7,601.55 for the fiscal year ended April 30, 1925."

Entered May 25, 1932.

[Seal] (Signed) J. E. MURDOCK,
Member.

A true copy: Teste.

[Seal] B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals. [43]

[Title of Court and Cause.]

PETITION FOR THE REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS.

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Now comes Zellerbach Paper Company, by its attorneys, Messrs. John Francis Neylan, and J. Paul Miller, and respectfully shows:

I.

Jurisdiction for Review.

This is a proceeding for review by the United States Circuit Court of Appeals for the Ninth Cir-

cuit of a decision of the United States Board of Tax Appeals, entered on the 19th day of May, 1932, as amended by that certain order entered May 25, 1932, and determining a deficiency in income and profits taxes for the fiscal year ending April 30, 1925, against your petitioner, in the sum of $7,601.55. [44]

This Petition is filed in pursuance of the provisions of Section 1001 of the Act of Congress approved on the 26th day of February, 1926, entitled the Revenue Act of 1926, as amended by the Revenue Act of 1928 and the Revenue Act of 1932.

II.

Your petitioner is a corporation organized and existing under and by virtue of the laws of the State of California, having its principal office and place of business in the City and County of San Francisco, State of California;

For the fiscal year ending April 30, 1925, Petitioner filed its income and profits tax return, on the 15th day of July, 1925, with the Collector of Internal Revenue for the First District of California, whose office was and is located in the City and County of San Francisco, State of California.

III.

Nature of Controversy.

The nature of the controversy is as follows:

The period involved is the fiscal year ended April 30, 1925. For this period respondent proposes that a deficiency of $7,601.55 be assessed against petitioner.

The Petitioner has conceded that the commissioner may proceed to assess and collect this amount as a deficiency unless the three year period of limitation, provided by the Revenue Act of 1926, applies and began to [45] run on July 15, 1925, the date on which the first return was filed.

On that date, to-wit: July 15, 1925, petitioner filed a consolidated income tax return under the Revenue Act of 1924, on behalf of itself and its affiliated corporations, to-wit; National Paper Products Company and Sanitary Products Corporation, with the Collector of Internal Revenue in San Francisco. The Revenue Act of 1924 provided for a tax of twelve and one-half (12½%) per cent on the net income of corporations and in the return filed on July 15, 1925 the tax was computed on that basis and the sum shown to be due, to-wit: $158,374.05 was thereafter assessed by the Commissioner and paid. This return was neither false nor fraudulent, nor was it filed with the intent to evade the tax rightfully due, or any part thereof.

Thereafter and on February 26, 1926, the Revenue Act of 1926 was adopted. It provided for a tax of thirteen (13%) per cent on the net income of corporations for the calendar year of 1925, (and for thirteen and one-half (13½%) per cent thereafter) in lieu of the twelve and one-half (12½%) per cent tax imposed for the same period, by the Revenue Act of 1924.

After the enactment of the 1926 Act the Commissioner furnished petitioner with a copy of Treasury Decision 3843, which provided that any

corporation becoming liable [46] for an additional tax under the 1926 Act should file a new return, and furnished petitioner with a form designated as "U. S. Internal Revenue Form 1120 A, Revised April 1926."

The petitioner filled in the heading of this form, copied into it from the original return filed on July 15, 1925, the figures under the heading "Computation of Tax", computed the additional tax due, executed the document by its Vice President and Assistant Secretary, and paid $2,111.65 the additional tax shown to be due. This return was filed with, and the additional tax paid to, the Collector of Internal Revenue in San Francisco, on May 14, 1926.

The return, upon its receipt by the Government, was designated as an amended return. Further evidence of its having been received as an amended return is found in a notation made upon the return itself, to-wit; "See original return".

A sixty day letter was issued to petitioner under date of October 10, 1928, and within sixty days thereafter petitioner appealed to the United States Board of Tax Appeals and thereafter filed its amended petition setting up as a defense the statute of limitations. Prior thereto the amount of deficiency was stipulated, petitioner reserving the defense of the statute of limitations. [47]

The statute of limitations under the 1924 Act is four years (Sec. 277 (a)); under the 1926 Act, three years (Sec. 277 (a) (1)).

On appeal, the Board of Tax Appeals upheld the

position of the Commissioner and held that the return filed on May 14, 1926, was the original return required under the 1926 Act to start the running of the three year statutory period, and that as the deficiency letter was mailed within three years of that date, to-wit: on October 10, 1928, it was mailed within the time required by law, and that the petitioner was liable for a deficiency of $7,601.55.

There are two questions involved:

First: Does the four year statute as provided in the 1924 Act apply, or does the three year period under the 1926 Act apply?

Second: Did the statutory period (whether three years or four years) begin to run with the filing of the original return, or only at the time of the filing of the amended return?

IV.

Assignments of Error.

The Petitioner states that in the record and proceedings before the Board of Tax Appeals, and in the decision and the final order of redetermination rendered and entered by the Board of Tax Appeals, manifest error [48] occurred which intervened to the prejudice of the Petitioner and the Petitioner assigns the following errors, and each of them, which it avers, occurred in said record, proceedings, decision and final order of redetermination, and upon which it relies to reverse said decision and final order of redetermination so rendered and returned by the Board of Tax Appeals, to-wit:

(a) The Board of Tax Appeals erred in holding

that the collection of the deficiency in question was not barred by the statute of limitations;

(b) The Board of Tax Appeals erred in holding that the statute of limitations began to run only with the filing of the return on May 14, 1926;

(c) The Board of Tax Appeals erred in not holding that the three year period of limitation commenced to run from the filing of the original return on July 15, 1925;

(d) The Board of Tax Appeals erred in not holding that the return filed on May 14, 1926 was merely an amended return;

(e) The Board of Tax Appeals erred in not holding that the three year period of limitations began to run from the filing of the original return, even though an amended return was filed on May 14, 1926;

(f) The Board of Tax Appeals erred in making the following statement in its opinion, which statement is not supported by the evidence; [49]

"We agree with the Commissioner that the return filed May 14, 1926, was the original return required under the 1926 Act to start the three year period of section 277 (a) (1)."

(g) The Board of Tax Appeals erred in finding a deficiency against the Petitioner for the fiscal year ending April 30, 1925, in the sum of $7,601.55;

(h) The Board of Tax Appeals erred in rendering decision for respondent.

WHEREFORE, your petitioner prays:

(1) That this Honorable Court review the decision of the United States Board of Tax Appeals.

(2) That the transcript of the record be prepared in accordance with the law and with the rules of this Honorable Court, and transmitted to the Clerk of this Court for filing.

(3) That appropriate action be taken by this Honorable Court to the end that the errors complained of may be reviewed and corrected.

(4) For such other and further relief as to this Honorable Court may seem fit and proper.

ZELLERBACH PAPER COMPANY,
By THOMAS McLAREN,
Vice-President.
JOHN FRANCIS NEYLAN,
J. PAUL MILLER,
Attorneys for Petitioner,
1 Montgomery Sreet,
San Francisco, California. [50]

State of California,
City and County of San Francisco.—ss.

Thomas McLaren, being first duly sworn, deposes and says:

That he is the Vice-President of Zellerbach Paper Company, the Petitioner in the above entitled matter; that as such he had authority to, and did sign the above and foregoing Petition; that he has read the same and knows the contents thereof; that the same is true of his own knowledge, except those matters which are therein alleged on information or belief, and that as to those matters he believes it to be

true; that the said Petition is filed in good faith, and not for the purpose of delay.

THOMAS McLAREN.

Subscribed and sworn to before me this 21st day of October, 1932.

[Seal] JAMES F. McCUE,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: United States Board of Tax Appeals. Filed November 1, 1932. [51]

[Title of Court and Cause.]

NOTICE OF FILING OF PETITION FOR REVIEW.

To: C. M. Charest, Esq.,
General Counsel,
Bureau of Internal Revenue,
Washington, D. C.
Attorney for Respondent.

PLEASE TAKE NOTICE that the above named Petitioner did, on the 1st day of November, 1932, file with the United States Board of Tax Appeals a Petition for Review of the decision of said Board in the above entitled cause by the United States Circuit Court of Appeals for the Ninth Circuit, a copy of which said Petition for Review is herewith served upon you.

JOHN FRANCIS NEYLAN,
J. PAUL MILLER,
Attorneys for Petitioner,
1 Montgomery Street,
San Francisco, California.

Service of the foregoing notice and service of a copy of the Petition for Review mentioned in said Notice, is hereby accepted this 1st day of November, 1932.

C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue,
Attorney for Respondent.

[Endorsed]: United States Board of Tax Appeals. Filed Nov. 1, 1932. [52]

PETITIONER'S EXHIBIT 3.

TREASURY DEPARTMENT.
INTERNAL REVENUE SERVICE.

San Francisco, Calif.

Office of the Collector
First District of
California
In Reply Refer to
Room 109—FFL

Gentlemen:

It is noted that the income tax returns for your corporation are filed on a fiscal year basis therefore the following is submitted for your information, in regard to time for filing new returns and paying additional tax under the Revenue Act of 1926 for corporations with fiscal years ending in 1925.

(T.D. 3843)

"Any corporation which has filed a return for a fiscal year ending in 1925 and paid or become liable for a tax computed under the

Revenue Act of 1924, and is subject to additional tax for the same period under the Revenue Act of 1926, must file a new return covering such additional tax on or before May 15th, 1926. Payment of the additional tax may be made at the time the return is filed or if installment payments are desired, such installments must be paid at the time they would be due if based upon a return for the fiscal year ended February 28th, 1926."

D. H. BLAIR,
Commissioner.

You should give this matter your immediate attention.

Respectfully,
JOHN P. McLAUGHLIN,
Collector.

JPMcL/FEL [53]

[Endorsed]: U. S. Board of Tax Appeals. Div. 9. Docket 41758-41759. Admitted in Evidence June 10, 1931. Petitioner's Exhibit 3.

(462M)

PETITIONER'S EXHIBIT 4.
TREASURY DEPARTMENT
Washington

Oct. 10, 1928.

Office of
Commissioner of Internal Revenue

Address Reply to
Commissioner of Internal Revenue
and Refer to
Zellerbach Paper Company,
534 Battery Street,
San Francisco, California.

Sirs:

In accordance with Section 274 of the Revenue Act of 1926 you are advised that the determination of your tax liability for the years 1924, 1925 and 1926 discloses a deficiency of $22,461.95 for the years 1924 and 1925 and an overassessment of $2,328.06 for the year 1926 as shown in the attached statement.

The section of the law above mentioned allows you to petition the United States Board of Tax Appeals within sixty days from the date of the mailing of this letter for a redetermination of your tax liability. However, if you acquiesce in this determination, you are requested to execute the enclosed Form 866 and forward both original and duplicate to the Commissioner of Internal Revenue, Wash-

ington, D. C., for the attention of IT:C:P-7.

Respectfully,

D. H. BLAIR,

Commissioner.

By C. B. ALLEN,

Deputy Commissioner.

Enclosures:

Statement

Form 866

Form 882

Schedules 1 to 35 inclusive.

[Endorsed]: U. S. Board of Tax Appeals Div. 9 Docket 41758-41759 Admitted in Evidence June 10, 1931. Petitioner's Exhibit 4. [54]

IT:AR:D:60D
CAM

STATEMENT OF RETURNS EXAMINED
AND
RESULTING TAX LIABILITY

Company	Fiscal Years	Forms	Deficiency in Tax	Over-assessment
Zellerbach Paper Company				
San Francisco, California.	April 30, 1924	1120 A. Cons.	$14,860.40	
	1925	1120 A. Cons.	7,601.55	
	1926	*		2,328.06
National Paper Products Company,				
San Francisco, California.	1924	#	14,649.82	
	1925	#	20,657.40	
	1926	*		11,849.04

* Income consolidated with return filed by Zellerbach Corporation, San Francisco, California.

Income consolidated with return filed by Zellerbach Paper Company, San Francisco, California.

The adjustments producing the above-stated results are the same as shown in Bureau letter dated August 31, 1928 and are shown in the attached Schedules 1 to 35, inclusive.

Certificates of Overassessments for the amounts shown above will be issued through the office of the Collector of Internal Revenue for your district and will be applied by that official in accordance with the provisions of Section 284 (a) of the Revenue Act of 1926.

A carbon of this letter has been mailed to John Francis Neylan in accordance with the authorization contained in your power of attorney running to him. [55]

Zellerbach Paper Company. Year ended April 30, 1924.

SCHEDULE 1

Net Income

Net income as disclosed by return		$432,957.61
As corrected		550,939.61
Net adjustment		$117,982.00
Unallowable deductions and additional income:		
(a) Bad Accounts	$81,312.68	
(b) Auto Insurance	5,055.10	
(c) Depreciation	47,429.00	
Total		133,796.78
Nontaxable income and additional deductions:		
(d) Oregon State Income Tax	$ 202.59	
(e) Appreciation	15,612.19	
Total		15,814.78
Net adjustment as above		$117,982.00

Zellerbach Paper Company. Year ended April 30, 1924.

SCHEDULE 2

Explanation of Items Changed

(a) Bad accounts claimed on return over book deduction		$81,312.68
Decrease reserve for losses claimed		3,917.45
Total		$85,230.13
Reserve April 30, 1923	$73,043.22	
Reserve April 30, 1924	69,125.77	
Decrease		3,917.45
Excess deduction (Double deduction)		$81,312.68

[56]

Zellerbach Paper Company. Year ended April 30, 1924.

SCHEDULE 7

Consolidated net income 1924

Net income as corrected:		
Zellerbach Paper Company (Schedule 1)	$550,939.61	
National Paper Products Company (Schedule 3)	759,215.79	
Total		$1,310,155.40
Net Losses As Corrected:		
The Sanitary Products Corporation, (Schedule 5)		8,704.94
Consolidated net income corrected		$1,301,450.46

SCHEDULE 8

Computation of Tax - 1924

Income Tax

Net income for taxable year (Schedule 7)	$1,301,450.46
Income tax at 12½%	$ 162,681.31

SCHEDULE 9

Allocation of Total Tax

Name of Company	Income	Amount
Zellerbach Paper Company	$ 550,939.61	$ 68,409.88
National Paper Products Company	759,215.79	94,271.43
Total	$1,310,155.40	$162,681.31

SCHEDULE 10

Allocation of Original Tax, assessed
Account #400008, Oct. 1924

Name of Company	Income	Amount
Zellerbach Paper Company	$ 432,957.61	$ 53,549.48
National Paper Products Company	643,755.67	79,621.61
Total	$1,076,713.28	$133,171.09

Zellerbach Paper Company. Year ended April 30, 1924.

SCHEDULE 11
Computation of Tax - 1924

National Paper Products Company	
Total tax liability - Allocated, Schedule 9	$ 94,271.43
Previously assessed - Allocated, Schedule 10	79,621.61
Additional tax	$ 14,649.82

SCHEDULE 12
Computation of Tax - 1924

Total tax liability - Allocated, Schedule 9	$ 68,409.88
Previously assessed - Allocated, Schedule 10	53,549.48
Additional tax	$ 14,860.40

[50]

Zellerbach Paper Company. Year ended April 30, 1925.

SCHEDULE 13

Net Income

Net income as disclosed by return		$490,802.78
As corrected		548,738.32
Net adjustment		$ 57,935.54
Unallowable deductions and additional income:		
(a) Bad Accounts	$57,884.22	
(b) Auto Insurance Reserve	3,925.57	
(c) Depreciation	13,945.21	
Total		$ 75,755.00
Nontaxable income and additional deductions:		
(d) State Income Tax	$ 2,083.86	
(e) Refund on purchases	10,354.93	
(f) Appreciation	5,380.67	
Total		$ 17,819.46
Net adjustment as above		$ 57,935.54

Zellerbach Paper Company. Year ended April 30, 1925

SCHEDULE 14

Explanation of Items Changed

(a) Bad Accounts claimed on return over book deduction		$ 57,884.22
Increase in reserve for losses		56.44
Net claimed		$ 57,827.78
Reserve - 4/30/1925	$69,182.21	
4/30/1924	69,125.77	
Increase		$ 56.44
Excess deduction (Double deduction)		$ 57,884.22

[51]

(b) Increase in reserve for auto insurance increases income accordingly:		
Reserve 4/30/1925	$22,327.49	
4/30/1924	18,401.92	
Increase		$ 3,925.57

Schedule 14
(Continued)

(c) Depreciation claimed on return (Machinery)	39,395.49
Taken on books and allowed	25,450.28
Excess	$13,945.21

(d) See explanation Schedule 2 (d).

(e) Income is decreased on account of error in entry of refund from American Investment and Realty Company on account of price of Olympic Paper and Power Company Stock adjusted in 1926, reversed herein and allowed 1925.

(f) See explanation Schedule 2 (e).

Zellerbach Paper Company. Year ended April 30, 1925

SCHEDULE 15

Net Income

National Paper Products Company.

Net income as disclosed by return		$787,864.49
As corrected		947,909.38
Net adjustment		$160,044.89
Unallowable deductions and additional income:		
(a) Bad Accounts	$ 6,768.17	
(b) Reserve for losses	4,133.16	
(c) Depreciation	129,809.36	
(d) Depletion	19,334.20	
Net adjustment as above		$160,044.89

[52]

Zellerbach Paper Company. Year ended April 30, 1925.

SCHEDULE 16

Explanation of Items Changed

(a)	Bad accounts claimed on return over book deduction		$ 6,768.17
	Increase in reserve for losses claimed (Not allowable)		4,133.16
			$ 10,901.33
	Reserve 4/30/1925	$29,556.53	
	4/30/1924	25,423.37	
	Increase		4,133.16
	Excess (double deduction)		$ 6,768.17
(b)	See analysis of reserve above; increase in reserve, increases income accordingly.		
(c)	Depreciation for 1925 reduced in 1926 and reversed herein by restoring to income in 1925 and allowing in 1926.		

Zellerbach Paper Company. Year ended April 30, 1925

Schedule 16
(Continued)

(d) Depletion claimed	$34,492.50
Corrected	
3,679.20 cords at $4.12 in accordance with Engineers report for prior years	15,158.30
Net disallowed	$19,334.20

SCHEDULE 17
Net Income

The Sanitary Products Corporation.

Net loss as disclosed by return		$ 11,674.88
As corrected - net loss		6,558.40
Net adjustment		$ 5,116.48
Unallowable deductions and additional income:		
(a) Reserve for losses	$ 2,848.62	
(b) Depreciation	2,267.86	
Net adjustment as above		$ 5,116.48

Zellerbach Paper Company. Year ended April 30, 1925.

SCHEDULE 18

Explanation of Items Changed

(a) Increase in reserve for losses, increases income accordingly:		
Reserve April 30, 1925	$ 7,975.82	
April 30, 1924	5,127.20	
Increase		$ 2,848.62
(b) Depreciation claimed, not on books, disallowed, excess claimed		$ 2,267.86

SCHEDULE 19

Consolidated Net Income - 1925

Net Income as Corrected:		
Zellerbach Paper Company, (Schedule 13)	$548,738.32	
National Paper Products Co. (Schedule 15)	947,909.38	
Total		$1,496,647.70
Net Losses As Corrected:		
The Sanitary Products Corporation (Schedule 17)		6,558.40
Consolidated net income corrected		$1,490,089.30

Zellerbach Paper Company. Year ended April 30, 1925

SCHEDULE 20
Computation of Tax - 1925
Income Tax

Net income for taxable year (Schedule 19)	$1,490,089.30
Income tax at 12½% - 1924 rated (8/12)	124,174.11
Income tax at 13% - 1925 Rates (4/12)	64,570.54
Total tax assessable	$188,744.65

[54]

SCHEDULE 21
Allocation of Total Tax

Name of Company	Income	Amount
Zellerbach Paper Company	$ 548,738.32	$ 69,202.27
National Paper Products Company	947,909.38	119,542.38
Total	$1,496,647.70	$188,744.65

Zellerbach Paper Company. Year ended April 30, 1925.

SCHEDULE 22

Allocation of Tax Assessed

Account #400,011, July 1925 158,374.05
Account #400,568, May 1926 2,111.65

Name of Company	Income	Amount
Zellerbach Paper Company	$ 490,802.78	$ 61,600.72
National Paper Products Company	787,864.49	98,884.98
Total	$1,278,667.27	$160,485.70

SCHEDULE 23

Computation of Tax - 1925

National Paper Products Company

Total tax liability - allocated, Schedule 21	$119,542.38
Previously assessed - allocated, Schedule 22	98,884.98
Additional Tax	$ 20,657.40

Zellerbach Paper Company. Year Ended April 30, 1925.

SCHEDULE 24
Computation of Tax - 1925

Total tax liability - Allocated, Schedule 21	$ 69,202.27
Previously assessed - Allocated, Schedule 22	61,600.72
Additional tax	$ 7,601.55

Year Ended April 30, 1926.

SCHEDULE 25
Net Income

Net income as disclosed by return	$833,563.82
As corrected	813,987.33
Net adjustment	$ 19,576.49
Unallowable deductions and additional income:	
(a) Reserve for auto insurance	$ 1,550.85

Schedule 25
(Continued)

Nontaxable income and additional deductions:			
(b) Reserve for losses		$ 365.81	
(c) Depreciation adjustment		13,731.80	
(d) M. M. Cohen, Trustee		7,029.74	
Total			21,127.35
Net adjustment as above			19,576.49

SCHEDULE 26
Explanation of Items Changed

(a) Auto insurance claimed on return			$ 12,500.00
Reserve April 30, 1925		$22,327.49	
April 30, 1926		11,378.35	
Decrease allowable			10,949.14
Excess deducted			$ 1,550.86

Zellerbach Paper Company. Year ended April 30, 1926.

Schedule 26
(Continued)

(b) Reserve for losses restored on return			$ 2,170.75
Reserve 4/30/1926	$70,987.15		
4/30/1925	69,182.21		
Net increase corrected			1,804.94
Excess restored			$ 365.81
(c) Depreciation for 1925 reduced in 1926 and reversed herein by allowing in 1926.			
(d) Book income is decreased by income included in account of M. M. Cohen, Trustee, which was restored to income of prior years.			
1920	$ 4,971.75		
1921	2,057.99		
Total			$ 7,029.74

Zellerbach Paper Company. Year ended April 30, 1926.

SCHEDULE 27

National Paper Products Company.

Net Income

Net income as disclosed by return		$1,407,048.93
As corrected		1,313,597.30
Net adjustment		$ 93,451.63
Unallowable deductions and additional income:		
(a) Adjusting error	.02	
(b) Goodwill	$36,357.71	
Total		$ 36,357.73
Nontaxable income and additional deductions:		
(c) Depreciation		129,809.36
Net adjustment as above		$ 93,451.63

vs. Guy T. Helvering

Zellerbach Paper Company. Year ended April 30, 1926.

SCHEDULE 28

Explanation of Items Changed

(a)	Decrease in reserve for losses claimed		$ 598.59
	Reserve - 4/30/1925	$29,556.53	
	4/30/1926	28,957.96	
	Net decrease		598.57
	Excess deducted		$ .02
(b)	Renshaw, Jones and Sutton Company stock purchased April 30, 1927, cost		$349,888.00
	Assets and liabilities taken over at book value and stock conceled, net worth (May 31, 1925)		313,530.29
	Loss claimed		$ 36,357.71

Disallowed as no deductible loss has been sustained, as you purchased and received value for the amount in good will.

(c) Contra adjustment (Schedule 16 (c).

Zellerbach Paper Company. Year ended April 30, 1926

SCHEDULE 29
Net Income

The Sanitary Products Company.

Net loss as disclosed by return			$ 7,964.25
As corrected - net loss			9,157.75
Net adjustment			$ 1,193.50
Nontaxable income and additional deductions:			
(a) Reserve for losses decreased, decreases income accordingly.			
Reserve 4/30/1925	$ 7,975.82		
4/30/1926	5,316.31		
Decrease		$2,659.51	
Claimed on return	$2,659.51		
	1,193.50	1,466.01	
Net adjustment as above		$1,193.50	

Zellerbach Paper Company. Year ended April 30, 1926.

SCHEDULE 30
Consolidated Net Income 1926.

Net Income As Corrected:		
Zellerbach Paper Company (Schedule 25)	$ 813,987.33	
National Paper Products Co., (Schedule 27)	1,313,597.30	
Total		$2,127,584.63
Net Losses As Corrected:		
The Sanitary Products Company, (Schedule 29)		9,157.75
Consolidated net income corrected		$2,118,426.88

SCHEDULE 31

Computation of Tax - 1926

Income Tax

Net income for taxable year (Schedule 30)	$2,118,426.88
Income tax at 13% - 1925 Rated (8/12)	$ 183,596.99
Income tax at 13½% - 1926 Rates (4/12)	95,329.21
Total tax assessable	$ 278,926.20

SCHEDULE 32

Allocation of Total Tax

Name of Company	Income	Amount
Zellerbach Paper Company	$ 813,987.33	$106,713.68
National Paper Products Company	$1,313,597.30	172,212.52
Total	$2,127,584.63	$278,926.20

Zellerbach Paper Company. Year ended April 30, 1926.

SCHEDULE 33

Allocation of Tax Assessed

Consolidated

Return Zellerbach Corporation,
Account #400011, July 1926

Name of Company - Group #2	Percent	Amount
Zellerbach Paper Company	$ 833,563.82	$109,041.74
National Paper Products Company	1,407,048.93	184,061.56
Group #1		
American Investment & Realty Company	102,401.82	
Washington Pulp & Paper Corporation	399,095.76	
Northwestern Power and Light Company	8,287.85	
Zellerbach Corporation	Loss	
Total - Group #1	$ 509,785.43	$ 66,687.02
Grand Total	$2,750,398.18	$359,790.32

Zellerbach Paper Company. Year ended April 30, 1926

SCHEDULE 34

Computation of Tax - 1926

National Paper Products Company	
Total Tax Liability - Allocated, Schedule 32	$172,212.52
Previously assessed - Allocated, Schedule 33	184,061.56
	$ 11,849.04

SCHEDULE 35

Computation of Tax - 1926

Zellerbach Paper Company.	
Total Tax Liability - Allocated, Schedule 32	$106,713.68
Previously assessed - Allocated, Schedule 33	109,041.74
Overassessment	$ 2,328.06

[60]

TREASURY DEPARTMENT
Washington

(462M) Oct. 10, 1928.

Office of
Commissioner of Internal Revenue
Address reply to
Commissioner of Internal Revenue

National Paper Products Company,
1789 Montgomery Street,
San Francisco, Calif.

Sirs:

In accordance with Section 274 of the Revenue Act of 1926 you are advised that the determination of your tax liability for the years 1924, 1925 and 1926 discloses a deficiency of $35,307.22 for the years 1924 and 1925 and an overassessment of $11,849.04 for the years 1926 as shown in the attached statement.

The section of the law above mentioned allows you to petition the United States Board of Tax Appeals within sixty days from the date of the mailing of this letter for a redetermination of your tax liability. However, if you acquiesce in this determination you are requested to execute the enclosed Form 866 and forward both original and duplicate to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:p-7.

Respectfully,
D. H. BLAIR, Commissioner.
By C. B. ALLEN, Deputy Commissioner.

Enclosures
Statement Form 866 Form 882 Form 7929

[Endorsed]: U. S. Board of Tax Appeals. Div. 9. Docket 41758 & 41759. Admitted in Evidence June 10, 1931. Petitioner's Exhibit 5. [61]

IT:AR:D:60D
CAM

STATEMENT OF RETURNS EXAMINED
AND
RESULTING TAX LIABILITY

Company	Fiscal Years	Deficiency in Tax	Over-assessment
National Paper Products Company, San Francisco, California.	1924	$14,649.82	
	1925	20,657.40	
	1926		$11,849.04

The adjustments producing the above-stated results are the same as shown in Bureau letter dated August 31, 1928 and are shown in Schedule attached to a letter addressed to Zellerbach Paper Company, San Francisco, California.

A certificate of overassessment will be issued for the amount shown above through the office of the Collector of Internal Revenue for your district, and will be applied by that official in accordance with the provisions of section 284 (a) of the Revenue Act of 1926. [62]

[Title of Court and Cause.]

STATEMENT OF EVIDENCE

The above-entitled cause came on for hearing before The Honorable E. H. Van Fossan, Member of the United States Board of Tax Appeals on the 10th day of June, 1931, at Oakland, California, there being present the Petitioner, by its Counsel, Messrs. John Francis Neylan, and J. Paul Miller, and the Respondent, by its Counsel, Messrs. H. A. Cox and F. R. Shearer (C. M. Charest, Esq., General Counsel.)

Thereupon the following proceedings were had and testimony heard by said Member pertaining to the issues involved in the Petition for Review filed with the United States Board of Tax Appeals on December 6, 1928.

Prior to the introduction of testimony, Counsel for Petitioner moved for the consolidation of the

above-entitled cause with one additional case, to-wit, Zellerbach Paper [63] Company, Petitioner, v. Commissioner of Internal Revenue, Respondent, United States Board of Tax Appeals Docket No. 41759, which motion was granted.

Thereupon Counsel for Petitioner moved for leave to file an Amended Petition, the purpose of which was to limit the question involved to the Statute of Limitations; there being no objection on the part of Counsel for the Respondent, said motion was granted, and the amended Petitions in each of the cases referred to herein were filed. Said amended Petitions are a part of the record herein.

Thereupon Counsel for the Respondent dictated an informal Answer to said amended Petitions, and thereafter a written Answer to said amended Petitions was filed, which Answer is a part of the record herein.

Thereupon Counsel for Petitioner offered in evidence a Consolidated Income Tax Return, on Form 1120-A, furnished by the Treasury Department of the United States, filed by Zellerbach Paper Company on behalf of itself and its subsidiaries, National Paper Products Company and Sanitary Products Corporation for the fiscal year May 1st, 1924, to and including April 30th, 1925; said return was received in evidence and marked "Petitioner's Exhibit No. 1."

Counsel for Petitioner then offered in evidence an additional document on Form 1120-A revised April, 1926, furnished by the Treasury Department of the United States, and headed [64] "Corporation In-

come Tax Return for Fiscal Year 1925." The word "amended" which appears on the face of said document was stamped there by a representative of the Commissioner of Internal Revenue. This document sets forth additional taxes due to the United States of America in the sum of $2,111.65, for the period May 1, 1924 to April 30, 1925, and was filed with the Collector of Internal Revenue, First District of California, San Francisco, California, May 14, 1926, by Zellerbach Paper Company, on behalf of itself and its subsidiaries, National Paper Products Company and Sanitary Products Corporation. Said document was received in evidence as "Petitioner's Exhibit No. 2."

Counsel for Petitioner thereupon offered in evidence a letter bearing the mimeographed signature of John P. McLaughlin on the stationery of the Treasury Department, Internal Revenue Service, San Francisco. Said document was thereupon received in evidence and designated as "Petitioner's Exhibit No. 3."

Thereupon the following proceedings occurred:—

> "Mr. Neylan: I asked counsel for the Government if he would stipulate that this Exhibit No. 3 was received by the Zellerbach Paper Company in the ordinary course of the mail; otherwise, it will put us to the necessity of producing a witness here to testify that that was received. [65]
>
> "Mr. Shearer: That is stipulated to now, and I think it was also covered in the answer as being true.

"Mr. Neylan: Yes, I think you are correct about that.

"The Member: That applies to Exhibit 3?

"Mr. Shearer: Yes."

Thereupon Counsel for the Petitioner called attention to the fact that there was some question as to the accuracy of the copy of the sixty-day letter attached to the Petition filed in the above-entitled matter, whereupon the original sixty-day letter forwarded by the Commissioner of Internal Revenue to Zellerbach Paper Company, and the original sixty-day letter forwarded by the Commissioner of Internal Revenue to National Paper Products Company were offered and received in evidence and designated as follows: Sixty-day letter addressed to Zellerbach Paper Company designated as "Petitioner's Exhibit No. 4;" sixty-day letter addressed to National Paper Products Company designated as "Petitioner's Exhibit No. 5."

Thereupon the following proceedings took place:

"Mr. Neylan: I will now ask Government counsel if they will stipulate that no other return was ever filed by either of these corporations in respect of the tax for the year under review?

"Mr. Shearer: That is agreed to. Counsel intends to include in that stipulation the fact that no return on Form 1122 was filed by the subsidiaries? [66]

"Mr. Neylan: My understanding is that the only returns ever filed by the parent and subsidiaries from my point of view is the original, and

the other is merely an amended return, and my understanding is those were the only returns ever made by the parent or the subsidiaries.

"Mr. Shearer: The Regulations of the Department, I may state to counsel, for a number of years, have required subsidiary corporations to file a return on forms 1122, which is subsidiary to the main return on Form 1120. So far as I know such returns were never filed by the subsidiaries in this case, and I am willing to stipulate with counsel that Exhibit 1 and Exhibit 2 are the only returns ever filed by either the Zellerbach Paper Company or any of its subsidiaries, the National Paper Products Company and the Sanitary Products Corporation, for the fiscal year 1925.

"The Member: Is there anything further?

"Mr. Neylan: That is our case, your Honor.

"The Member: Anything on behalf of the Government?

"Mr. Cox: We have nothing."

The foregoing is the substance of the evidence adduced at the trial of this proceeding pertaining to the issues involved in this appeal.

JOHN FRANCIS NEYLAN
J. PAUL MILLER
Attorneys for Petitioner
1 Montgomery Street,
San Francisco, California. [67]

The foregoing evidence is all of the material evidence adduced at the hearing before the Board of

Tax Appeals, and the same is approved by the undersigned, C. M. Charest, General Counsel, Bureau of Internal Revenue, as attorney for the Commissioner of Internal Revenue.

(Sgd.) C. M. CHAREST
General Counsel. (S.)
Bureau of Internal Revenue

The foregoing is all of the material evidence adduced at the hearing and in order that the same may be preserved and made a part of the record, this statement of evidence is duly approved and settled this ..... day of ....., 1933.

.....
Member, United States Board
of Tax Appeals

[Endorsed]: Approved and Ordered Filed this 15 day of Feb., 1933.

(Sgd.) J. E. MURDOCK
Member (S)

[Endorsed]: United States Board of Tax Appeals. Filed February 15, 1933. [68]

[Title of Court and Cause.]

PRAECIPE FOR RECORD

To the Clerk of the United States Board of Tax Appeals:

You will please prepare and, within sixty days from the date of the filing of the Petition for Review in the above entitled case, transmit to the Clerk

of the United States Circuit Court of Appeals for the Ninth Circuit certified copies of the following documents:

1. The docket entries of all proceedings before the Board of Tax Appeals in the above entitled cause;

2. The Petition of the taxpayer, together with deficiency letter dated October 10, 1928, attached to which is "Statement of Returns Examined and Resulting Tax Liability;" together with sixty day letter dated October 10, 1928 addressed to Zellerbach Paper Company, parent of Petitioner, which sixty day letter was incorporated in sixty day letter issued to this Petitioner by reference thereto. [69]

3. Answer of Commissioner of Internal Revenue;

4. Amended Petition;

5. Commissioner's Answer to Amended Petition;

6. Findings of Fact and Opinion of Board, including Dissenting Opinion;

7. Decision of the Board entered May 19, 1932;

8. Order of the Board correcting decision entered under date of May 19, 1932, said Order having been entered May 25, 1932;

9. Petition for Review to the Circuit Court of Appeals for the Ninth Circuit;

10. Notice of Filing Petition for Review;

11. Petitioner's Exhibit number one, being Income Tax Return filed by Zellerbach Paper Company, parent of Petitioner on behalf of the said Zellerbach Paper Company and this Petitioner and Sanitary Products Corporation for the fiscal year ended April 30, 1925;

12. Petitioner's Exhibit number two, being document designated as Amended Return filed by Zellerbach Paper Company, parent of Petitioner on behalf of the said Zellerbach Paper Company, this Petitioner and Sanitary Products Corporation on May 14, 1928;

13. Petitioner's Exhibit number three, same being a circular letter bearing the mimeographed signature of [70] J. P. McLaughlin, Collector of Internal Revenue, San Francisco, California;

14. Petitioner's Exhibit number four, and Petitioner's Exhibit number five, being original sixty day letters issued by Commissioner of Internal Revenue to Zellerbach Paper Company and to National Paper Products Company respectively, these Exhibits having been offered in lieu of sixty day letters attached to Petitions filed by said companies on account of typographical errors therein;

15. Statement of Evidence;

16. This Praecipe;

the foregoing to be prepared, certified and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

JOHN FRANCIS NEYLAN
J. PAUL MILLER
Attorneys for Petitioner
1 Montgomery Street,
San Francisco, California.

[Endorsed]: United States Board of Tax Appeals. Filed November 23, 1932. [71]

[Title of Court and Cause.]

CERTIFICATE

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 71, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 28th day of March, 1933.

[Seal] B. D. GAMBLE
Clerk,
United States Board of Tax Appeals.

[Endorsed]: No. 7140. United States Circuit Court of Appeals for the Ninth Circuit. National Paper Products Company, a corporation, Petitioner. vs. Guy T. Helvering, as Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review an Order of the United States Board of Tax Appeals.

Filed April 26, 1933.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Nos. 7140 AND 7141

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NATIONAL PAPER PRODUCTS COMPANY, a Corporation,
Petitioner,
vs.
GUY T. HELVERING, as Commissioner of Internal Revenue,
Respondent.
} No. 7140

ZELLERBACH PAPER COMPANY, a Corporation,
Petitioner,
vs.
GUY T. HELVERING, as Commissioner of Internal Revenue,
Respondent.
} No. 7141

Upon Petitions to Review Orders of the United States Board of Tax Appeals.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

United States Circuit Court of Appeals for the Ninth Circuit

ZELLERBACH PAPER COMPANY, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Board of Tax Appeals Docket No. 41,759
NATIONAL PAPER PRODUCTS COMPANY, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Board of Tax Appeals Docket No. 41,758

STIPULATION AND ORDER FOR CONSOLIDATION ON APPEAL.

Whereas, the two above-named cases, upon motion of John Francis Neylan, Counsel for Petitioners, and consented to by Counsel for Respondent, were consolidated by order of the United States Board of Tax Appeals for trial; and

Whereas, after said trial by the United States Board of Tax Appeals of said consolidated cases, a joint opinion applying to said two cases was rendered by said Board; and

Whereas, petitions for the review of the decision of the United States Board of Tax Appeals by the United States Circuit Court of Appeals for the Ninth Circuit have been filed by the Petitioners with the Clerk of the United States Board of Tax Appeals, and the appeals perfected; and

Whereas, the same point of law is involved in each of said cases, to-wit: is the collection from the Petitioners of the additional tax claimed by the Respondent for the fiscal year ending April 30th, 1925, barred by the Statute of Limitations; and

Whereas, it is the opinion of the respective Counsel for the parties to the said cases that it would most suit their convenience in the handling of the said cases on appeal, and would also be of great assistance to the said United States Circuit Court of Appeals in its determination of said cases, if said cases should be consolidated for purposes of appeal;

It is hereby stipulated by and between John Francis Neylan and J. Paul Miller, Counsel for each of the Petitioners in the above-entitled cases, and C. M. Charest, General Counsel, Bureau of Internal Revenue, Counsel for the Respondents in each of said cases,

1. That said cases may be consolidated for the purpose of appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and for the purpose of oral argument before said Court;

2. That but a single printed transcript of record on appeal be prepared by and printed under the direction of the Clerk of said Court, said Clerk to avoid including in said printed transcript more than

one copy of such matters and documents as are duplicated in the certified transcripts of record sent up to him by the Clerk of the United States Board of Tax Appeals;

3. That on all occasions, when pursuant to law or rule of court, the parties to said cases are privileged to file briefs, a single brief, rather than two, may be filed, wherein all matters involved in all of said cases may be discussed and argued;

4. That the said two cases may be heard by the United States Circuit Court of Appeals for the Ninth Circuit upon one oral argument before said Court.

Dated: San Francisco, California, February 1st, 1933.

JOHN FRANCIS NEYLAN
J. PAUL MILLER
Attorneys for Petitioner.
C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue,
Attorney for Respondents.

It is hereby ordered, that pursuant to the above stipulation, the two above-named cases be and they are hereby consolidated in accordance with the terms of said stipulation.

Dated: San Francisco, California, March 10, 1933.

CURTIS D. WILBUR,
United States Circuit Judge.

[Endorsed]: United States Board of Tax Appeals. Filed Mar. 14, 1933.

[Endorsed]: Filed Apr. 26, 1933. Paul P. O'Brien, Clerk.

United States Board of Tax Appeals
Washington

United States of America
District of Columbia—ss.

I, B. D. Gamble, clerk of the United States Board of Tax Appeals, hereby certify the foregoing and attached to be true and correct copies of the Stipulation and Order for Consolidation on Appeal in Docket Numbers 41758, 41759, wherein Zellerbach Paper Company and National Paper Products Company, are Petitioners and the Commissioner of Internal Revenue is Respondent.

In testimony whereof I hereunto subscribe my name and affix the seal of said Board of Tax Appeals at the city of Washington in said District this 11th day of April, 1933.

[Seal] B. D. GAMBLE
Clerk, United States Board of
Tax Appeals.

At a stated Term, to wit, the October Term, A. D. 1932 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday the twenty-fourth day of July, in the year of our Lord One Thousand Nine Hundred and thirty-three.

Present: Honorable WILLIAM H. SAWTELLE, Circuit Judge, Presiding, Honorable FRANK H. NORCROSS, District Judge.

No.....

In the Matter of the Substitution of Guy T. Helvering, as Commissioner of Internal Revenue in the Place of David Burnet.

Upon consideration of the motion of petitioner or petitioners, consented to by respondent or respondents, in each of the following causes, It Is Ordered that Guy T. Helvering, as Commissioner of Internal Revenue be, and he hereby is substituted for David Burnet, former Commissioner of Internal Revenue in each of the following cases, and that each of the following causes be so continued and maintained:

National Paper Products Company vs. Commissioner of I. R. No. 7140.

Same vs. Same. No. 7211.

Zellerbach Paper Company vs. Commissioner of I. R. No. 7141.

Same vs. Same. No. 7209.

Same vs. Same. No. 7210.

At a stated Term, to wit, the October Term, A. D. 1933 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Thursday, the fourteenth day of December in the year of our Lord One Thousand Nine Hundred and thirty-three.

Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding, Honorable WILLIAM H. SAWTELLE, Circuit Judge, Honorable FRANCIS A. GARRECHT, Circuit Judge.

ORDER OF SUBMISSION

ORDERED petition to review in each of above causes argued by Mr. John Francis Neylan, counsel for petitioners, and by Mr. Francis H. Horan, Special Assistant to the Attorney General, counsel for respondent, and submitted to the court for consideration and decision.

At a stated Term, to wit, the October Term, A. D. 1933 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Wednesday the twenty-eighth day of February in the year of our Lord One Thousand Nine Hundred and thirty-four.

Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding, Honorable WILLIAM H. SAWTELLE, Circuit Judge, Honorable FRANCIS A. GARRECHT, Circuit Judge.

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENTS.

By direction of the Court, ORDERED that the typewritten opinion this day rendered by this court in above causes be forthwith filed by the clerk and that a judgment be filed in each cause and entered in the minutes of this court in accordance with the opinion filed.

[Title of Court and Cause.]

OPINION

Upon Petition to Review an Order of the United States Board of Tax Appeals.

Before: WILBUR, SAWTELLE and GARRECHT, Circuit Judges.

WILBUR, Circuit Judge:

Petitioners seek a review of an order of the Board of Tax Appeals affirming a deficiency assessment for income taxes. The sole question presented by the record is whether or not the assessment was too late.

On July 15, 1925, the petitioner made a return for its fiscal year ending April 30, 1925, filing a consolidated income tax return on behalf of itself and its subsidiaries, the National Paper Products Company and the Sanitary Products Corporation. The question is whether or not this return started the period of limitation for making an assessment under the Revenue Act of 1926. It is alleged and is conceded "that said return was filed in strict compliance with the Revenue Act of 1924 then in force and effect and that said return was neither false nor fraudulent". This return showed a net income of $1,266,992.39 and a tax thereon computed by the taxpayer at the rate of 12½ per cent as provided in the statutes of 1924 (§ 230 Rev. Act 1924, 43 Stat. 253, 282), amounting to $158,374.05. This tax was paid in four installments of $39,593.51, the first on July 15, 1925, and the last on April 16, 1926. On February 26, 1926, the Revenue Act of 1926 was passed, by the terms of which the tax on the net

income of corporations was increased for the calendar year 1925 to 13 per cent of the amount of the net income (44 Stat. 9, 39, § 230 (a)), an increase of ½ of one per cent. On February 28, 1926, the Commissioner of Internal Revenue issued his decision No. 3843 requiring the filing of a new return by a corporation which had filed a return for the fiscal year ending in 1925 where such corporation was required to pay an additional tax by the Revenue Act of 1926. We quote the rule as follows:

> "To Collectors of Internal Revenue and others concerned:
>
> Any corporation which has filed a return for a fiscal year ending in 1925 and paid or become liable for a tax computed under the Revenue Act of 1924, and is subject to additional tax for the same period under the Revenue Act of 1926, must file a new return covering such additional tax on or before May 15, 1926. Payment of the additional tax may be made at the time the return is filed or, if installment payments are desired such installments must be paid at the time they would be due, if based upon a return for the fiscal year ended February 28, 1926."

The petitioner came within the scope of this decision. After the promulgation of the Treasury Decision No. 3843 as above set forth, a copy of same was mailed to the petitioner by the Collector of Internal Revenue at San Francisco, California, requesting that the filing of an amended income tax

return as provided for therein, be given immediate attention. In pursuance of this decision and request, on May 14, 1926, the taxpayer filed a new return with the Collector of Internal Revenue at San Francisco. It insists, however, that this return is a mere amendment of the previous return, or supplement thereto, and is not "the return" within the meaning of the Revenue Act of 1926 relating to limitation of the period of assessment (§ 277 (a) (1) Rev. Act. 1926). The blank furnished by the Department of Internal Revenue for the purpose of this return is in the usual form of corporate return for the fiscal year 1925 and in making the return the petitioner left blank all the spaces showing the amounts and sources of gross income and the deductions therefrom authorized by the Revenue Act of 1926, and in lieu of such information stated the net income for the year ending 1925 to be $1,266,992.39 in conformity with the return theretofore filed on July 25th under the Revenue Act of 1924. The taxpayer, in computing the tax in the return of May 14, 1926 in conformity with this form of return, estimated the tax for the period from April 30, 1924 to January 1, 1925, eight months, at 12½ per cent to be $105,582.70, and for the four months beginning January 1, 1925 and ending April 30, 1925, estimated at 13 per cent, as $54,903. The tax for the taxable year of petitioner thus estimated by the taxpayer was $160,485.70, which was $2,112.65 more than the taxpayer had already paid upon his estimate of the tax under his return of July 15, 1925. A check

for this latter amount accompanied the return. The deficiency letter of October 10, 1928 showed a total tax of $188,744.65 on the consolidated return instead of $160,485.70 as estimated and paid by the taxpayer. This increased tax was based on a determination that the net income for the taxable year was $1,490,089.30 instead of $1,266,992.39 as fixed by the taxpayer. In the return of May 14, 1926 the tax was computed by the taxpayer on the net income of $1,266,992.39 for 8/12th of the period at the 1924 rate of 12½ per cent, and at the 1925 rate of 13 per cent for 4/12th of the period on the same net income, that is, from January 1st to April 30th. It is also admitted that the net income and the tax thereon was properly determined by the Commissioner in his deficiency letter. It will be observed in this connection that the difference in the amount of tax imposed by the Revenue Acts of 1924 and 1926, one-half of one per cent for one-third of a year (one-sixth of one per cent) is a comparatively small portion of the deficiency tax determined by the Commissioner in the deficiency letter.

It is claimed that the assessment and collection of the tax is barred by the Revenue Act of 1926 which fixed the limitation for the assessment of taxes (44 Stat. 9, 58, §277), as follows:

> "Sec. 277 (a) Except as provided in section 278—
>
> (1) The amount of income taxes imposed by this act shall be assessed within three years after the return was filed, and no proceeding

in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

(2) The amount of the income, excess-profits, and war-profits taxes imposed by the Revenue Act of 1921, and by such act as amended, for the taxable year 1921 and succeeding taxable years, and the amount of income taxes imposed by the Revenue Act of 1924, shall be assessed within four years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period."

It will be observed that the deficiency letter was within four years after return filed by the taxpayer July 15, 1925 and was within three years of the return filed by the taxpayer May 14, 1926. The contention of the petitioner is that the tax imposed for its fiscal year 1925 was necessarily imposed under the Revenue Act of 1926 and that therefore the three year period specified in sub. (1) of §277 (a) of the Revenue Act of 1926 applies rather than sub. (2) of the same section, requiring assessment within four years and that the return filed July 15, 1925 started the three year period running. The petitioner states its position in its brief as follows:

"The 1924 act was repealed by §1200 (a) of the 1926 act as of January 1, 1925, with certain unimportant exceptions as noted; the 1918 act

was repealed by §1400 (a) of the 1921 act as of January 1, 1921, with certain unimportant exceptions as noted. As a result of the repeal of the 1924 act by the 1926 act as of January 1, 1925, any further impositions or attempted impositions of taxes for the calendar year 1925, or any fiscal year ending in 1925, are necessarily made under the terms of the 1926 act.

And likewise, the Commissioner is necessarily limited under the provisions of the 1926 act, to a period of three years after the filing of a return within which to make an additional assessment (or to send out a deficiency letter)."

We agree that the tax here involved was imposed under the Revenue Act of 1926, for reasons which will be now stated.

Section 230, "Title II Income Tax" of the Revenue Act of 1924 (43 Stat. 253) which fixes the rate of corporate income taxes, above referred to, is expressly repealed by the Revenue Act of 1926 (§1200). Where the taxable year ended in 1925 the Revenue Act of 1926 provided for the imposition of the tax as follows:

"Sec. 207 (a). If the taxpayer makes return for a period beginning in one calendar year hereinafter in this subdivision called 'first calendar year') and ending in the second following calendar year (hereinafter in this subdivision called 'second calendar year') and the law applicable to the second calendar year is dif-

ferent from the law applicable to the first calendar year, then his tax *under this title* for the period ending during the second calendar year shall be the sum of: (1) the same proportion of a tax for the entire period, determined under the law applicable to the first calendar year and at the rates for such year, which the portion of such period falling within the first calendar year is of the entire period; and (2) the same proportion of a tax for the entire period, determined under the law applicable to the second calendar year and at the rates for such year, which the portion of such period falling within the second calendar year is of the entire period." (Italics ours.)

It will be observed that the law expressly states that the taxpayer making the return for a taxable year ending in 1925 shall have his tax fixed "under this title". The result of this provision of the Revenue Act of 1926 (§207 (a)) is that if there has been a change in the method of ascertainment of the net income the tax thereon would be increased or decreased. It follows that if either the gross income is increased by the new method of computation fixed by the Revenue Act of 1926 or the permissible deductions therefrom to ascertain the net income are decreased, in either event the net income or taxable base is increased for the four months beginning January 1, 1925 and ending April 30, 1925. There were changes in the Revenue Act of 1926 affecting both the gross income and the deductions therefrom,

but before pointing out some of these changes it should be stated that it seems to be conceded that these changes did not in fact affect this particular taxpayer and that the only change applicable to it was the increased rate of taxation of one-half of one per cent, but we are concerned not with the effect on the particular taxpayer, but with the question of whether or not the Commissioner of Internal Revenue was authorized by rule to require the filing of new returns under the act of 1926 and whether a return made in compliance with that rule is "the return" referred to in the Revenue Act of 1926 (207 (a)) which limits the period for assessing the tax to three years from the date of the return. It is sufficient for our purpose to point out some of the changes in the Revenue Act of 1926 from the provisions of the Revenue Act of 1924 which affect either the method of estimating the gross income or the allowable deductions therefrom. We find that by the Revenue Act of 1926 (§202 (b)) the method of determining the profit from the sale of the property which had been acquired by the taxpayer prior to March 1, 1913 is changed from the method provided in the Revenue Act of 1924. While the change is obvious from an inspection of the statute a convenient way to state the effect of the change is by quotation from the report of the Senate Committee on Finance in submitting the revenue bill of 1926 to the Senate. Senate Rep. No. 52, 69th Congress, first session, contained in Senate Rep. 2-484 for that session:

"Section 202 (b): When property was acquired prior to March 1, 1913, the present law provides that in the case of a sale of such property the basis for determining gain or loss shall be cost or March 1, 1913, value, whichever is higher; and also provides that in making adjustments for depreciation, etc., proper adjustment shall be made for depreciation, etc., 'previously allowed'. Owing to the fact that there was no income tax prior to March 1, 1913, in cases where property was acquired prior to that date no depreciation has been 'allowed', and the taxpayer may receive too large a basis for determining gain or loss. The amendment proposed provides that the deductions for depreciation, etc., to be made in such cases shall be such deductions as were actually sustained with respect to such property, which would include such depreciation as had occurred prior to that date.

"Under existing law in the case of determining gain from the sale or other disposition of property, the cost or March 1, 1913, value of such property is required to be reduced by the amount of depreciation or depletion allowed under prior income tax laws. It has been claimed that the effect of this provision is to allow a taxpayer to elect to take no depreciation or depletion against his annual income and to permit him to write off the entire cost or March 1 value at time of sale. The bill as passed by the House provides that the cost or March 1, 1913,

value in the case of sale shall be reduced by the amount of depreciation or depletion allowable under prior income tax acts in computing the gain subject to tax. It is believed that the rule stated by the House bill is the correct rule and that all taxpayers should be required to take proper annual deductions for depreciation and depletion.

"Section 202 (b) (2) as written by the House provides that in no case shall the amount of the reduction of the basis by reason of depletion exceed a depletion deduction computed without reference to discovery value. Inasmuch as the depletion in the case of oil and gas wells, as recommended by the committee by its amendment to section 204 (c) of the bill, is to be based on a percentage of gross income instead of on discovery value, the committee recommends that section 202 (b) of the bill be amended by inserting a provision that in no case shall the amount of the diminution for depletion exceed a depletion deduction computed without reference to an allowance based on a percentage of gross income."

(See to the same effect report of the House Comm. on Ways and Means, p. 5, House Rep. on Public Bills 1-362, 69th Congress, first session).

This change in the statute might make very great changes in the taxable net income of the taxpayer. For instance, the amount claimed by the petitioner in his return for depreciation resulting from ex-

haustion, wear and tear and obsolescence was $558,-348.94. The gross profits returned were $5,256,-205.82. The total deductions were $3,597,100.32. The decision of the Supreme Court in Murphy Oil Co. v. Burnet, 287 U. S. 299, and our own decision therein, 55 F. (2d) 17, indicates the difficulties in estimating the proper amount of deductions for depletion and exhaustion in the case of oil properties and the importance thereof in estimating the tax. It also appears from this report of the Senate Committee on Finance that the reason for imposing the additional tax of one-half of one per cent upon the corporation income was because of the fact that the Revenue Act of 1926 repealed the capital stock tax. Another change from the Revenue Act of 1924 is in regard to the discovery value of oil property. We refer to the report of the House Committee on Ways and Means above referred to at page 6 for a discussion of the reason, purpose and effect of the change without quoting the same, as it is sufficient for our purposes to call attention to the fact that the Revenue Act of 1926 provides for a different method of estimating discovery depletion in the case of a corporation owning and selling oil property from that provided in the Revenue Act of 1924.

These changes in the method of estimating the net income of the taxpayer for the period beginning January 1, 1925, and the method of estimating the taxpayer's income under the Revenue Act of 1924 for the period beginning April 30, 1924 and ending January 1, 1925, show the necessity of requiring the

taxpayer to make the new return under the Revenue Act of 1926 as a basis for fixing the tax. It is true that in the case at bar it is agreed in effect that the changes we have referred to, and such others as may have been made in the method of estimating the gross income or the deductions therefrom, did not affect the taxable net income of the petitioner for the four-month period in the calendar year 1925, but this fact could only be ascertained definitely by a return showing that neither the gross income shown by the original return nor the net income thereby shown was affected by these changes in the statute, or by an independent examination of the affairs of the taxpayer for that purpose.

We conclude that the tax of the petitioner for the taxable year ending April 30, 1925 was imposed under the Revenue Act of 1926 and, consequently, that the assessment of the tax must be made within three years after "the return" was filed (Rev. Act 1926, §207 (a), §230, §286, supra). The question then resolves itself into this, was the return of July 15, 1925 or the return of May 14, 1926 "the return" which started the three year period of limitation running. The question is, what did Congress intend by the words "the return" used in §277 (a), sub. (1), Revenue Act of 1926, as the basis for starting the statute of limitations running against the Commissioner and the Government. That question will now be considered:

Section 227 of the Act of 1926, which relates back to January 1, 1925, provides for the filing of returns on the 15th day of the third month following the

close of the fiscal year. Consequently it is urged that the return filed July 15, 1925 was a return under the Revenue Act of 1926 retroactively in effect on that date. However, §239 of that Act provides that "every corporation subject to taxation *under* this title shall make a return stating specific items of its gross income and the deduction and credits allowed *by this title*", etc. (Italics ours) Can it be said that a return made before the Act of 1926 was passed requiring a return to be made in compliance with the Revenue Act of 1926 is "the return" contemplated by the Revenue Act of 1926 even if we assume that for certain purposes a return theretofore made could be utilized as a basis for assessing the taxes under the 1926 Act? It is clear that "the return" filed by the taxpayer before the Revenue Act of 1926 was passed could not be considered an effort on his part to comply with the not yet enacted law of 1926. It was a return under and for the purpose of taxation in accordance with the law of 1924. This return provided the data (net income) for the taxation of the income for the eight months included in the calendar year 1924. Eigth-twelfths of the tax thereon computed would be the amount taxable under the Revenue act of 1926 for the period ending January 1, 1925. The return does not purport to show either the net income or the tax under the Act of 1926 for the four months included in the calendar year 1925. Unless the return filed July 15, 1925 can be considered a return under the Revenue Act of 1926, enacted more than six months later, but retroactively effective six months earlier, the statute

of limitations has not run. It is difficult to see how the action of the taxpayer before the Act requiring the action can be deemed a compliance with the statute or an act done under the statute not yet passed or applicable, notwithstanding its retroactive provisions.

The contention of the petitioner is in effect that inasmuch as a return was in fact made under the law then in force requiring such return (Rev. Act 1924) and inasmuch as such return contains all the data necessary for the Commissioner to make the assessment, under the Act of 1926 retroactively then in force, there was no necessity or occasion for a new return, and that the statute of 1926 requiring a return must be construed as retroactively applying to "the return" already filed. Consequently, it is argued that Congress having by its retroactive legislation recognized the return theretofore made during the calendar year 1925 as a return, the action of the Commissioner in adopting a rule requiring a new return is in conflict with the intent of Congress and therefore void, or, to the same effect, that the new return is not the return required by the law. These contentions are based upon the assumption that the Commissioner had only to add to the tax an additional tax of one-sixth of one per cent on the net income shown by the return; consequently, that he could very well make the assessment without further data. One difficulty with this contention is that it ignores the history and the practice of the department acquiesced in by Congress from the first

by which the taxpayer has been required not only to make return of the amount of his income and claim his deductions and credits under the applicable Revenue Act but also to estimate the amount of the tax due from the taxpayer. One of the purposes of the return as developed historically is the estimate of the tax to be paid by the taxpayer. Congress has repeatedly recognized such an estimate of the tax by the taxpayer as a proper basis for payment and has provided an elaborate system for fixing the amount of the deficiency therein. For instance, the Revenue Act of 1918, §250 (a), providing for the payment of the income tax in installments shows that the Act contemplates that the tax shall be computed by the taxpayer. The statute says:

> "§250 (b): As soon as practicable after the return is filed, the Commissioner shall examine it. If it then appears that the correct amount of the tax is greater or less than that shown in the return the installments shall be recomputed, * * * In such case if the return is made in good faith *and the understatement of the amount in the return* is not due to any fault of the taxpayer, there shall be no penalty because of such understatement. If the understatement is due to negligence on the part of the taxpayer, but without intent to defraud, there shall be added as part of the tax 5 per centum of the amount of the deficiency," etc. (Italics ours)

See also §250 (a) (b) of the Act of 1921. The Revenue Act of 1924, §273-1 defines a deficiency, among

other things, as "the amount by which the tax imposed by this title *exceeds the amount shown as the tax by the taxpayer* upon his return". That act also provides that, "Where *the amount determined by the taxpayer* as proposed by this title * * * *is not paid* at the time prescribed for its payment, there is to be collected * * *", etc. (Italics ours). This same provision was incorporated in the Revenue Act of 1926 (276 (a) (1)).

In view of this established practice it would seem entirely reasonable that the Commissioner should require a new return under a newly enacted law where as result of that law there was an increased tax due from the taxpayer, and it is quite immaterial to this consideration whether or not the change involved is great or small because payment of the additional tax is and and must be based upon a new return by the taxpayer. The Commissioner cannot determine the deficiency due to the changes made by the new law until he is ready to determine the proper assessment. That determination not only involves careful analysis of the return filed by the taxpayer, but in the case such as that at bar involving a gross income of over $5,000,000 and claimed deductions of over $3,000,000 would require very careful consideration of the books and business of the corporation. That this process is one that requires much time is recognized by every act of Congress which, although it requires the Commissioner to promptly determine the tax, gives him several years in which to make the determination. Hence,

Zellerbach Paper Company. Year ended April 30, 1924.

Schedule 2
(Continued)

(b) Charges to reserve for auto insurance included in adjustment on return restoring increase to reserve of $2,075.71 constitutes a double deduction.		
Proof—Reserve 4/30 - 1924		$18,401.92
4/30 - 1923		16,326.21
Net increase		$ 2,075.71
(c) Depreciation corrected:		
Machinery, etc. 4/30/23	$379,229.77 at 8%	$30,338.39
Additions, 1924	37,870.84 at 4%	1,514.83
Buildings (10 year lease)	34,961.32 at 10%	3,496.13
Automobiles claimed on books (No Change)		32,062.50
Total allowed		$67,411.85

Zellerbach Paper Company. Year ended April 30, 1924.

Schedule 2
(Continued)

Claimed on return		$72,686.44
Add: Error on return:		
Depreciation on books	$ 70,420.89	
Less - Restored on return	28,266.48	42,154.41
Total on return		$114,840.85
Allowed as above		67,411.85
Disallowed net		$ 47,429.00

(d) Oregon State income tax is allowable deduction.

(e) Appreciation of Assets is not taxable income. [57]

vs. Guy T. Helvering

Zellerbach Paper Company. Year ended April 30, 1924.

SCHEDULE 3

Net Income

National Paper Products Company.

Net Income as disclosed by return		$643,755.67
As corrected		759,215.79
Net adjustment		$115,460.12
Unallowable deductions and additional income:		
(a) Bad accounts	$23,519.40	
(b) Depreciation	91,940.72	
Net adjustment as above		$115,460.12

SCHEDULE 4

Explanation of Items Changed

(a) Bad accounts claimed on return over book deduction	$ 23,519.40
Decrease reserve for losses claimed	30.32
Total	$ 23,549.72

Schedule 4
(Continued)

Reserve April 30, 1923	$25,453.69	
April 30, 1924	25,423.37	
Decrease		30.32
Excess deduction (Double deduction)		$ 23,519.40
(b) Depreciation Corrected:		
Machinery and Equipment:		
San Francisco - 4/30/23	$ 193,653.36 at 8%	$ 15,492.27
Additions 1924	(14,242.54) at 4%	(569.70)
Stockton, Los Angeles & H.Q. 4/30/23	1,329,940.28 at 8%	106,395.22
Additions 1924	713,232.07 at 4%	28,529.28
Carthage - 4/30/23	703,350.46 at 8%	56,268.04
Additions 1924	65,059.38 at 4%	2,602.37
Buildings Stockton 4/30/23	1,050,699.98 at 2½%	26,267.50
Additions 1924	126,031.53 at 1¼%	1,575.39
Buildings Carthage - 4/20/23	346,863.90 at 2½%	8,671.60
Additions 1924	5,312.30 at 1¼%	66.40
Automobiles claimed (No Change)		5,233.54
Total Allowable		$250,531.91

Zellerbach Paper Company. Year ended April 30, 1924.

Schedule 4
(Continued)

(b) Continued.		
Claimed on return		$310,027.47
Add - Error on return:		
Depreciation on books	$269,280.99	
Less - Restored on return	236,835.83	32,445.16
Total on return		$342,472.63
Allowed as above		250,531.91
Disallowed net		$ 91,940.72

The Sanitary Products Corporation.

Zellerbach Paper Company. Year ended April 30, 1924.

SCHEDULE 5
Net Income

Net loss as disclosed by return		$ 11,344.52
As corrected - net loss		8,704.94
Net adjustment		$ 2,639.58
Unallowable deductions and additional income:		
(a) Reserve for losses	$ 2,396.44	
(b) Depreciation	243.14	
Net adjustment as above		$ 2,639.58

Zellerbach Paper Company. Year ended April 30, 1924.

SCHEDULE 6

Explanation of Items Changed

(a)	Increase in reserve for losses increases income accordingly:	
	Reserve - 4/30/1924	$ 5,127.20
	4/30/1923	2,730.76
	Net increase	$ 2,396.44
		[59]
(b)	Depreciation claimed on machinery	$ 1,215.69
	Corrected: Average assets, $12,156.92 at 8%	972.55
	Net disallowed	$ 243.14
	Automobiles allowed as claimed.	

Zellerbach Paper Company. Year ended April 30, 1924.

SCHEDULE 7

Consolidated net income 1924

Net income as corrected:		
Zellerbach Paper Company (Schedule 1)	$550,939.61	
National Paper Products Company (Schedule 3)	759,215.79	
Total		$1,310,155.40
Net Losses As Corrected:		
The Sanitary Products Corporation, (Schedule 5)		8,704.94
Consolidated net income corrected		$1,301,450.46

SCHEDULE 8

Computation of Tax - 1924

Income Tax

Net income for taxable year (Schedule 7)	$1,301,450.46
Income tax at 12½%	$ 162,681.31

Zellerbach Paper Company. Year ended April 30, 1924.

SCHEDULE 9

Allocation of Total Tax

Name of Company	Income	Amount
Zellerbach Paper Company	$ 550,939.61	$ 68,409.88
National Paper Products Company	759,215.79	94,271.43
Total	$1,310,155.40	$162,681.31

SCHEDULE 10

Allocation of Original Tax, assessed

Account #400008, Oct. 1924

Name of Company	Income	Amount
Zellerbach Paper Company	$ 432,957.61	$ 53,549.48
National Paper Products Company	643,755.67	79,621.61
Total	$1,076,713.28	$133,171.09

Zellerbach Paper Company. Year ended April 30, 1924.

SCHEDULE 11

Computation of Tax - 1924

National Paper Products Company	
Total tax liability - Allocated, Schedule 9	$ 94,271.43
Previously assessed - Allocated, Schedule 10	79,621.61
Additional tax	$ 14,649.82

SCHEDULE 12

Computation of Tax - 1924

Total tax liability - Allocated, Schedule 9	$ 68,409.88
Previously assessed - Allocated, Schedule 10	53,549.48
Additional tax	$ 14,860.40

[61]

Zellerbach Paper Company. Year ended April 30, 1925.

SCHEDULE 13

Net Income

Net income as disclosed by return		$490,802.78
As corrected		548,738.32
Net adjustment		$ 57,935.54
Unallowable deductions and additional income:		
(a) Bad Accounts	$57,884.22	
(b) Auto Insurance Reserve	3,925.57	
(c) Depreciation	13,945.21	
Total		$ 75,755.00
Nontaxable income and additional deductions:		
(d) State Income Taxes	$ 2,083.86	
(e) Refund on purchases	10,354.93	
(f) Appreciation	5,380.67	
Total		$ 17,819.46
Net adjustment as above		$ 57,935.54

Zellerbach Paper Company. Year ended April 30, 1925

SCHEDULE 14
Explanation of Items Changed

(a) Bad Accounts claimed on return over book deduction		$ 57,884.22
Increase in reserve for losses		56.44
Net claimed		$ 57,827.78
Reserve - 4/30/1925	$69,182.21	
4/30/1924	69,125.77	
Increase		$ 56.44
Excess deduction (Double deduction)		$ 57,884.22
		[62]
(b) Increase in reserve for auto insurance increases income accordingly:		
Reserve 4/30/1925	$22,327.49	
4/30/1924	18,401.92	
Increase		$ 3,925.57

Zellerbach Paper Company. Year ended April 30, 1925.

Schedule 14
(Continued)

(c) Depreciation claimed on return (Machinery)	39,395.49
Taken on books and allowed	25,450.28
Excess	$13,945.21

(d) See explanation Schedule 2 (d).

(e) Income is decreased on account of error in entry of refund from American Investment and Realty Company on account of price of Olympic Paper and Power Company Stock adjusted in 1926, reversed herein and allowed 1925.

(f) See explanation Schedule 2 (e).

Zellerbach Paper Company.

Year ended April 30, 1925

SCHEDULE 15

Net Income

National Paper Products Company.

Net income as disclosed by return		$787,864.49
As corrected		947,909.38
Net adjustment		$160,044.89
Unallowable deductions and additional income:		
(a) Bad Accounts	$ 6,768.17	
(b) Reserve for losses	4,133.16	
(c) Depreciation	129,809.36	
(d) Depletion	19,334.20	
Net adjustment as above		$160,044.89

[63]

Zellerbach Paper Company. Year ended April 30, 1925.

SCHEDULE 16

Explanation of Items Changed

(a)	Bad accounts claimed on return over book deduction		$ 6,768.17
	Increase in reserve for losses claimed (Not allowable)		4,133.16
			$ 10,901.33
	Reserve 4/30/1925	$29,556.53	
	4/30/1924	25,423.37	
	Increase		4,133.16
	Excess (double deduction)		$ 6,768.17
(b)	See analysis of reserve above; increase in reserve, increases income accordingly.		
(c)	Depreciation for 1925 reduced in 1926 and reversed herein by restoring to income in 1925 and allowing in 1926.		

Zellerbach Paper Company. Year ended April 30, 1925

Schedule 16
(Continued)

(d) Depletion claimed	$34,492.50
Corrected	
3,679.20 cords at $4.12 in accordance with Engineers report for prior years	15,158.30
Net disallowed	$19,334.20

SCHEDULE 17
Net Income

The Sanitary Products Corporation.		
Net loss as disclosed by return		$ 11,674.88
As corrected - net loss		6,558.40
Net adjustment		$ 5,116.48
Unallowable deductions and additional income:		
(a) Reserve for losses	$ 2,848.62	
(b) Depreciation	2,267.86	
Net adjustment as above		$ 5,116.48

Zellerbach Paper Company. Year ended April 30, 1925.

SCHEDULE 18

Explanation of Items Changed

(a) Increase in reserve for losses, increases income accordingly:		
Reserve April 30, 1925	$ 7,975.82	
April 30, 1924	5,127.20	
Increase		$ 2,848.62
(b) Depreciation claimed, not on books, disallowed, excess claimed		$ 2,267.86

SCHEDULE 19

Consolidated Net Income - 1925

Net Income as Corrected:		
Zellerbach Paper Company, (Schedule 13)	$548,738.32	
National Paper Products Co. (Schedule 15)	947,909.38	
Total		$1,496,647.70
Net Losses As Corrected:		
The Sanitary Products Corporation (Schedule 17)		6,558.40
Consolidated net income corrected		$1,490,089.30

SCHEDULE 20
Computation of Tax - 1925
Income Tax

Net income for taxable year (Schedule 19)	$1,490,089.30
Income tax at 12½% - 1924 rates (8/12)	124,174.11
Income tax at 13% - 1925 Rates (4/12)	64,570.54
Total tax assessable	$188,744.65

[65]

SCHEDULE 21
Allocation of Total Tax

Name of Company	Income	Amount
Zellerbach Paper Company	$ 548,738.32	$ 69,202.27
National Paper Products Company	947,909.38	119,542.38
Total	$1,496,647.70	$188,744.65

Zellerbach Paper Company. Year ended April 30, 1925.

SCHEDULE 22

Allocation of Tax Assessed

Account #400,011, July 1925 158,374.05
Account #400,568, May 1926 2,111.65

Name of Company	Income	Amount
Zellerbach Paper Company	$ 490,802.78	$ 61,600.72
National Paper Products Company	787,864.49	98,884.98
Total	$1,278,667.27	$160,485.70

SCHEDULE 23

Computation of Tax - 1925

National Paper Products Company	
Total tax liability - allocated, Schedule 21	$119,542.38
Previously assessed - allocated, Schedule 22	98,884.98
Additional Tax	$ 20,657.40

[66]

Zellerbach Paper Company. Year Ended April 30, 1925.

SCHEDULE 24
Computation of Tax - 1925

Total tax liability - Allocated, Schedule 21	$ 69,202.27
Previously assessed - Allocated, Schedule 22	61,600.72
Additional tax	$ 7,601.55

Year Ended April 30, 1926.

SCHEDULE 25
Net Income

Net income as disclosed by return	$833,563.82
As corrected	813,987.33
Net adjustment	$ 19,576.49
Unallowable deductions and additional income:	
(a) Reserve for auto insurance	$ 1,550.86

Zellerbach Paper Company. Year ended April 30, 1926.

Schedule 25
(Continued)

Nontaxable income and additional deductions:		
(b) Reserve for losses	$ 365.81	
(c) Depreciation adjustment	13,731.80	
(d) M. M. Cohen, Trustee	7,029.74	
Total		21,127.35
Net adjustment as above		19,576.49

SCHEDULE 26
Explanation of Items Changed

(a) Auto insurance claimed on return		$ 12,500.00
Reserve April 30, 1925	$22,327.49	
April 30, 1926	11,378.35	
Decrease allowable		10,949.14
Excess deducted		$ 1,550.86

Schedule 26
(Continued)

(b) Reserve for losses restored on return		$ 2,170.75
Reserve 4/30/1926	$70,987.15	
4/30/1925	69,182.21	
Net increase corrected		1,804.94
Excess restored		$ 365.81

(c) Depreciation for 1925 reduced in 1926 and reversed herein by allowing in 1926.

(d) Book income is decreased by income included in account of M. M. Cohen, Trustee, which was restored to income of prior years.

1920	$ 4,971.75	
1921	2,057.99	
Total		$ 7,029.74

Zellerbach Paper Company. Year ended April 30, 1926.

SCHEDULE 27

National Paper Products Company.

Net Income

Net income as disclosed by return		$1,407,048.93
As corrected		1,313,597.30
Net adjustment		$ 93,451.63
Unallowable deductions and additional income:		
(a) Adjusting error	.02	
(b) Goodwill	$36,357.71	
Total		$ 36,357.73
Nontaxable income and additional deductions:		
(c) Depreciation		129,809.36
Net adjustment as above		$ 93,451.63

SCHEDULE 28

Explanation of Items Changed

(a)	Decrease in reserve for losses claimed		$ 598.59
	Reserve - 4/30/1925	$29,556.53	
	4/30/1926	28,957.96	
	Net decrease		598.57
	Excess deducted		$ .02
(b)	Renshaw, Jones and Sutton Company stock purchased April 30, 1927, cost		$349,888.00
	Assets and liabilities taken over at book value and stock canceled, net worth (May 31, 1925)		313,530.29
	Loss claimed		$ 36,357.71
	Disallowed as no deductible loss has been sustained, as you purchased and received value for the amount in good will.		
(c)	Contra adjustment (Schedule 16 (c).		

Zellerbach Paper Company. Year ended April 30, 1926

SCHEDULE 29
Net Income

The Sanitary Products Company.

Net loss as disclosed by return				$ 7,964.25
As corrected - net loss				9,157.75
Net adjustment				$ 1,193.50
Nontaxable income and additional deductions:				
(a) Reserve for losses decreased, decreases income accordingly.				
Reserve 4/30/1925		$ 7,975.82		
4/30/1926		5,316.31		
Decrease			$2,659.51	
Claimed on return	$2,659.51			
	1,193.50		1,466.01	
Net adjustment as above				

[69]

Zellerbach Paper Company. Year ended April 30, 1926.

SCHEDULE 30
Consolidated Net Income 1926.

Net Income As Corrected:		
Zellerbach Paper Company (Schedule 25)	$ 813,987.33	
National Paper Products Co., (Schedule 27)	1,313,597.30	
Total		$2,127,584.63
Net Losses As Corrected:		
The Sanitary Products Company, (Schedule 29)		9,157.75
Consolidated net income corrected		$2,118,426.88

Zellerbach Paper Company. Year ended April 30, 1926

SCHEDULE 31

Computation of Tax - 1926

Income Tax

Net income for taxable year (Schedule 30)	$2,118,426.88
Income tax at 13% - 1925 Rates (8/12)	$ 183,596.99
Income tax at 13½% - 1926 Rates (4/12)	95,329.21
Total tax assessable	$ 278,926.20

SCHEDULE 32

Allocation of Total Tax

Name of Company	Income	Amount
Zellerbach Paper Company	$ 813,987.33	$106,713.68
National Paper Products Company	$1,313,597.30	172,212.52
Total	$2,127,584.63	$278,926.20

Zellerbach Paper Company. Year ended April 30, 1926.

SCHEDULE 33
Allocation of Tax Assessed
Consolidated

Return Zellerbach Corporation,
Account #400011, July 1926

Name of Company - Group #2	Percent	Amount
Zellerbach Paper Company	$ 833,563.82	$109,041.74
National Paper Products Company	1,407,048.93	184,061.56
Group #1		
American Investment & Realty Company	102,401.82	
Washington Pulp & Paper Corporation	399,095.76	
Northwestern Power and Light Company	8,287.85	
Zellerbach Corporation	Loss	
Total - Group #1	$ 509,785.43	$ 66,687.02
Grand Total	$2,750,398.18	$359,790.32

Zellerbach Paper Company. Year ended April 30, 1926

SCHEDULE 34

Computation of Tax - 1926

National Paper Products Company	
Total Tax Liability - Allocated, Schedule 32	$172,212.52
Previously assessed - Allocated, Schedule 33	184,061.56
Overassessment	$ 11,849.04

SCHEDULE 35

Computation of Tax - 1926

Zellerbach Paper Company.	
Total Tax Liability - Allocated, Schedule 32	$106,713.68
Previously assessed - Allocated, Schedule 33	109,041.74
Overassessment	$ 2,328.06

PETITIONER'S EXHIBIT 5.

TREASURY DEPARTMENT

Washington

(462M) Oct. 10, 1928.

Office of
Commissioner of Internal Revenue
Address reply to
Commissioner of Internal Revenue
and Refer to
National Paper Products Company,
1789 Montgomery Street,
San Francisco, California

Sirs:

In accordance with Section 274 of the Revenue Act of 1926 you are advised that the determination of your tax liability for the years 1924, 1925 and 1926 discloses a deficiency of $35,307.22 for the years 1924 and 1925 and an overassessment of $11,849.04 for the years 1926 as shown in the attached statement.

The section of the law above mentioned allows you to petition the United States Board of Tax Appeals within sixty days from the date of the mailing of this letter for a redetermination of your tax liability. However, if you acquiesce in this determination you are requested to execute the enclosed Form 866 and forward both original and duplicate to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:p-7.

Respectfully,

D. H. BLAIR, Commissioner.

By C. B. ALLEN, Deputy Commissioner.

Enclosures

Statement Form 866 Form 882 Form 7929

[Endorsed]: U. S. Board of Tax Appeals. Div. 9. Docket 41758 & 41759. Admitted in Evidence June 10, 1931. Petitioner's Exhibit 5. [72]

IT:AR:D:60D
CAM

STATEMENT OF RETURNS EXAMINED
AND
RESULTING TAX LIABILITY

Company	Fiscal Years	Deficiency in Tax	Over-assessment
National Paper Products Company, San Francisco, California.	1924	$14,649.82	
	1925	20,657.40	
	1926		$11,849.04

The adjustments producing the above-stated results are the same as shown in Bureau letter dated August 31, 1928 and are shown in Schedule attached to a letter addressed to Zellerbach Paper Company, San Francisco, California.

A certificate of overassessment will be issued for the amount shown above through the office of the Collector of Internal Revenue for your district, and will be applied by that official in accordance with the provisions of section 284 (a) of the Revenue Act of 1926. [73]

[Title of Court and Cause.]

STATEMENT OF EVIDENCE

The above-entitled cause came on for hearing before The Honorable E. H. Van Fossan, Member of the United States Board of Tax Appeals on the 10th day of June, 1931, at Oakland, California, there being present the Petitioner, by its Counsel, Messrs. John Francis Neylan, and J. Paul Miller, and the Respondent, by its Counsel, Messrs. H. A. Cox and F. R. Shearer (C. M. Charest, Esq., General Counsel.)

Thereupon the following proceedings were had and testimony heard by said Member pertaining to the issues involved in the Petition for Review filed with the United States Board of Tax Appeals on December 6, 1928.

Prior to the introduction of testimony, Counsel for Petitioner moved for the consolidation of the

above-entitled cause with one additional case, to-wit, National Paper [74] Products Company, Petitioner, v. Commissioner of Internal Revenue, Respondent, United States Board of Tax Appeals Docket No. 41758, which motion was granted.

Thereupon Counsel for Petitioner moved for leave to file an Amended Petition, the purpose of which was to limit the question involved to the Statute of Limitations; there being no objection on the part of Counsel for the Respondent, said motion was granted, and the amended Petitions in each of the cases referred to herein were filed. Said amended Petitions are a part of the record herein.

Thereupon Counsel for the Respondent dictated an informal Answer to said amended Petitions, and thereafter a written Answer to said amended Petitions was filed, which Answer is a part of the record herein.

Thereupon Counsel for Petitioner offered in evidence a Consolidated Income Tax Return, on Form 1120-A, furnished by the Treasury Department of the United States, filed by Zellerbach Paper Company on behalf of itself and its subsidiaries, National Paper Products Company and Sanitary Products Corporation for the fiscal year May 1st, 1924, to and including April 30th, 1925; said return was received in evidence and marked "Petitioner's Exhibit No. 1."

Counsel for Petitioner then offered in evidence an additional document on Form 1120-A revised April, 1926, [75] furnished by the Treasury Department of the United States, and headed "Corporation In-

come Tax Return for Fiscal Year 1925." The word "amended" which appears on the face of said document was stamped there by a representative of the Commissioner of Internal Revenue. This document sets forth additional taxes due to the United States of America in the sum of $2,111.65, for the period May 1, 1924 to April 30, 1925, and was filed with the Collector of Internal Revenue, First District of California, San Francisco, California, May 14, 1926, by Zellerbach Paper Company, on behalf of itself and its subsidiaries, National Paper Products Company and Sanitary Products Corporation. Said document was received in evidence as "Petitioner's Exhibit No. 2."

Counsel for Petitioner thereupon offered in evidence a letter bearing the mimeographed signature of John P. McLaughlin on the stationery of the Treasury Department, Internal Revenue Service, San Francisco. Said document was thereupon received in evidence and designated as "Petitioner's Exhibit No. 3."

Thereupon the following proceedings occurred:—

> "Mr. Neylan: I asked counsel for the Government if he would stipulate that this Exhibit No. 3 was received by the Zellerbach Paper Company in the ordinary course of the mail; otherwise, it will put us to the necessity of producing a witness here to testify that that was received. [76]
>
> "Mr. Shearer: That is stipulated to now, and I think it was also covered in the answer as being true.

"Mr. Neylan: Yes, I think you are correct about that.

"The Member: That applies to Exhibit 3?

"Mr. Shearer: Yes."

Thereupon Counsel for the Petitioner called attention to the fact that there was some question as to the accuracy of the copy of the sixty-day letter attached to the Petition filed in the above-entitled matter, whereupon the original sixty-day letter forwarded by the Commissioner of Internal Revenue to Zellerbach Paper Company, and the original sixty-day letter forwarded by the Commissioner of Internal Revenue to National Paper Products Company were offered and received in evidence and designated as follows: Sixty-day letter addressed to Zellerbach Paper Company designated as "Petitioner's Exhibit No. 4;" sixty-day letter addressed to National Paper Products Company designated as "Petitioner's Exhibit No. 5."

Thereupon the following proceedings took place:

"Mr. Neylan: I will now ask Government counsel if they will stipulate that no other return was ever filed by either of these corporations in respect of the tax for the year under review?

"Mr. Shearer: That is agreed to. Counsel intends to include in that stipulation the fact that no return on Form 1122 was filed by the subsidiaries? [77]

"Mr. Neylan: My understanding is that the only returns ever filed by the parent and subsidiaries from my point of view is the original, and

the other is merely an amended return, and my understanding is those were the only returns ever made by the parent or the subsidiaries.

"Mr. Shearer: The Regulations of the Department, I may state to counsel, for a number of years, have required subsidiary corporations to file a return on form 1122, which is subsidiary to the main return on Form 1120. So far as I know such returns were never filed by the subsidiaries in this case, and I am willing to stipulate with counsel that Exhibit 1 and Exhibit 2 are the only returns ever filed by either the Zellerbach Paper Company or any of its subsidiaries, the National Paper Products Company and the Sanitary Products Corporation, for the fiscal year 1925.

"The Member: Is there anything further?

"Mr. Neylan: That is our case, your Honor.

"The Member: Anything on behalf of the Government?

"Mr. Cox: We have nothing."

The foregoing is the substance of the evidence adduced at the trial of this proceeding pertaining to the issues involved in this appeal.

JOHN FRANCIS NEYLAN
J. PAUL MILLER
Attorneys for Petitioner
1 Montgomery Street,
San Francisco, California. [78]

The foregoing evidence is all of the material evidence adduced at the hearing before the Board of

Tax Appeals, and the same is approved by the undersigned, C. M. Charest, General Counsel, Bureau of Internal Revenue, as attorney for the Commissioner of Internal Revenue.

C. M. CHAREST
General Counsel.
Bureau of Internal Revenue

The foregoing is all of the material evidence adduced at the hearing and in order that the same may be preserved and made a part of the record, this statement of evidence is duly approved and settled this ..... day of ....., 1933.

.....
Member, United States Board
of Tax Appeals

[Endorsed]: Approved and Ordered Filed this 15 day of Feb., 1933.

(Sgd.) J. E. MURDOCK
Member (S)

[Endorsed]: United States Board of Tax Appeals. Filed Feb. 15, 1933. [79]

[Title of Court and Cause.]

PRAECIPE FOR RECORD

To the Clerk of the United States Board of Tax Appeals:

You will please prepare and, within sixty days from the date of the filing of the Petition for Review in the above entitled case, transmit to the Clerk

of the United States Circuit Court of Appeals for the Ninth Circuit certified copies of the following documents:

1. The docket entries of all proceedings before the Board of Tax Appeals in the above entitled cause;

2. The Petition of the taxpayer, together with deficiency letter dated October 10, 1928, attached to which is "Statement of Returns Examined and Resulting Tax Liability;"

3. Answer of Commissioner of Internal Revenue;

4. Notice to produce from Petitioner's attorney to attorney for Respondent, dated May 29, 1931; (not of record).

5. Amended Petition; [80]

6. Commissioner's Answer to Amended Petition;

7. Findings of Fact and Opinion of Board, including Dissenting Opinion;

8. Decision of the Board entered May 19, 1932;

9. Order of the Board correcting decision entered under date of May 19, 1932, said Order having been entered May 25, 1932;

10. Petition for Review to the Circuit Court of Appeals for the Ninth Circuit;

11. Notice of Filing Petition for Review;

12. Petitioner's Exhibit number one, being Income Tax Return filed by Petitioner on behalf of itself, National Paper Products Company and Sanitary Products Corporation for the fiscal year ending April 30, 1925;

13. Petitioner's Exhibit number two, being doc-

ument designated as Amended Return filed by Zellerbach Paper Company, on behalf of itself, National Paper Products Company and Sanitary Products Corporation on May 14, 1926;

14. Petitioner's Exhibit number three, same being a circular letter bearing the mimeographed signature of J. P. McLaughlin, Collector of Internal Revenue, San Francisco, California;

15. Petitioner's Exhibit number four, and Petitioner's Exhibit number five, being original sixty day letters issued [81] by Commissioner of Internal Revenue to Zellerbach Paper Company and to National Paper Products Company respectively, these Exhibits having been offered in lieu of sixty day letters attached to Petitions filed by said companies on account of typographical errors therein;

16. Statement of Evidence;

17. This Praecipe;

the foregoing to be prepared, certified and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

JOHN FRANCIS NEYLAN
J. PAUL MILLER
Attorneys for Petitioner
1 Montgomery Street,
San Francisco, California.

[Endorsed]: United States Board of Tax Appeals. Filed November 23, 1932. [82]

[Title of Court and Cause.]

CERTIFICATE

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 82, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 31st day of March, 1933.

[Seal] B. D. GAMBLE
Clerk,
United States Board of Tax Appeals.

[Endorsed]: No. 7141. United States Circuit Court of Appeals for the Ninth Circuit. Zellerbach Paper Company, a corporation, Petitioner, vs. Guy T. Helvering, as Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review an Order of the United States Board of Tax Appeals.

Filed April 26, 1933.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

P83

No. 7141

United States

Circuit Court of Appeals

For the Ninth Circuit.

ZELLERBACH PAPER COMPANY, a Corporation,
Petitioner,

vs.

GUY T. HELVERING, as Commissioner of Internal Revenue,
Respondent.

No. 7141

Upon Petition to Review an Order of the United States Board of Tax Appeals.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

United States Circuit Court of Appeals for the Ninth Circuit

ZELLERBACH PAPER COMPANY, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Board of Tax Appeals Docket No. 41759
NATIONAL PAPER PRODUCTS COMPANY, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Board of Tax Appeals Docket No. 41758

STIPULATION AND ORDER FOR CONSOLIDATION ON APPEAL.

Whereas, the two above-named cases, upon motion of John Francis Neylan, Counsel for Petitioners, and consented to by Counsel for Respondent, were consolidated by order of the United States Board of Tax Appeals for trial; and

Whereas, after said trial by the United States Board of Tax Appeals of said consolidated cases, a joint opinion applying to said two cases was rendered by said Board; and

Whereas, petitions for the review of the decision of the United States Board of Tax Appeals by the United States Circuit Court of Appeals for the Ninth Circuit have been filed by the Petitioners with the Clerk of the United States Board of Tax Appeals, and the appeals perfected; and

Whereas, the same point of law is involved in each of said cases, to-wit: is the collection from the Petitioners of the additional tax claimed by the Respondent for the fiscal year ending April 30th, 1925, barred by the Statute of Limitations; and

Whereas, it is the opinion of the respective Counsel for the parties to the said cases that it would most suit their convenience in the handling of the said cases on appeal, and would also be of great assistance to the said United States Circuit Court of Appeals in its determination of said cases, if said cases should be consolidated for purposes of appeal;

It is hereby stipulated by and between John Francis Neylan and J. Paul Miller, Counsel for each of the Petitioners in the above-entitled cases, and C. M. Charest, General Counsel, Bureau of Internal Revenue, Counsel for the Respondents in each of said cases,

1. That said cases may be consolidated for the purpose of appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and for the purpose of oral argument before said Court;

2. That but a single printed transcript of record on appeal be prepared by and printed under the direction of the Clerk of said Court, said Clerk to avoid including in said printed transcript more than one copy of such matters and documents as are

duplicated in the certified transcripts of record sent up to him by the Clerk of the United States Board of Tax Appeals;

3. That on all occasions, when pursuant to law or rule of court, the parties to said cases are privileged to file briefs, a single brief, rather than two, may be filed, wherein all matters involved in all of said cases may be discussed and argued;

4. That the said two cases may be heard by the United States Circuit Court of Appeals for the Ninth Circuit upon one oral argument before said Court.

Dated: San Francisco, California, February 1st, 1933.

JOHN FRANCIS NEYLAN
J. PAUL MILLER
Attorneys for Petitioner.
C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue,
Attorney for Respondents.

It is hereby ordered, that pursuant to the above stipulation, the two above-named cases be and they are hereby consolidated in accordance with the terms of said stipulation.

Dated: San Francisco, California, March 10, 1933.

CURTIS D. WILBUR,
United States Circuit Judge.

[Endorsed]: United States Board of Tax Appeals. Filed Mar. 14, 1933.

[Endorsed]: Filed Apr. 26, 1933. Paul P. O'Brien, Clerk.

[CLERK'S NOTE.]

Pursuant to stipulation of counsel for respective parties, and order of the court thereon, this case was consolidated with its companion case, No. 7140 entitled National Paper Products Company, a corporation, petitioner, vs. Guy T. Helvering, as Comm'r of Int. Revenue, respondent, for briefing, argument and decision. Accordingly, all proceedings in the Circuit Court of Appeals for the Ninth Circuit in this case will be found at pages 91 to 114, inclusive, of the record in that companion case, and such proceedings, being similar, are not reprinted here in the interest of economy.

United States Circuit Court of Appeals
for the Ninth Circuit.

No. 7141

ZELLERBACH PAPER COMPANY,
a Corporation,

Petitioner,

vs.

GUY T. HELVERING, as Commissioner of Internal Revenue,

Respondent.

JUDGMENT.

Upon Petition to Review an Order of the United States Board of Tax Appeals.

This Cause came on to be heard on the Transcript of the Record from the United States Board of Tax Appeals and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the Order of the said Board of Tax Appeals in this Cause be, and hereby is affirmed.

[Endorsed]: Filed and entered Feb. 28, 1934. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

[Title of Cause and Number.]

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, PAUL P. O'BRIEN, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing eighty-nine pages, numbered from and including 1 to and including 89 to be a full, true and correct copy of the record as filed in this cause in the said Circuit Court of Appeals, together with stipulation and order consolidating this cause with its companion cause for briefing, argument and decision, and judgment filed and entered herein; and that all proceedings in this cause in this court were had jointly with its companion case, and that the proceedings as set forth as part of the record in that case cover both these companion cases, and that this record together with those proceedings is a full, true and correct copy of the entire record of the above entitled cause in said Circuit Court of Appeals, excluding original exhibits transmitted herewith, made pursuant to request of counsel for petitioner, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, State of California, this 28th day of March, 1934.

[Seal] PAUL P. O'BRIEN,
Clerk.

[fol. 92] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 4, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

In the Supreme Court

OF THE

United States

Supreme Court, U. S.
FILED
MAY 10 1934
CHARLES ELMORE CROPLEY
CLERK

OCTOBER TERM, 1933

Nos.

NATIONAL PAPER PRODUCTS COMPANY (a Corporation),

Petitioner,

vs.

GUY T. HELVERING, as Commissioner of Internal Revenue,

Respondent.

35

No. 1035

ZELLERBACH PAPER COMPANY (a Corporation),

Petitioner,

vs.

GUY T. HELVERING, as Commissioner of Internal Revenue,

Respondent.

36

No. 1036

PETITION FOR WRITS OF CERTIORARI,
to the United States Circuit Court of Appeals
for the Ninth Circuit,
and
BRIEF IN SUPPORT THEREOF.

JOHN FRANCIS NEYLAN,
J. PAUL MILLER,
No. 1 Montgomery Street, San Francisco, California,
Attorneys for Petitioners.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1933

Nos.

NATIONAL PAPER PRODUCTS COMPANY
(a Corporation),

Petitioner,

vs.

GUY T. HELVERING, as Commissioner of Internal Revenue,

Respondent.

ZELLERBACH PAPER COMPANY
(a Corporation),

Petitioner,

vs.

GUY T. HELVERING, as Commissioner of Internal Revenue,

Respondent.

PETITION FOR WRITS OF CERTIORARI,
to the United States Circuit Court of Appeals
for the Ninth Circuit.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The Petition of National Paper Products Company, a Corporation, and Zellerbach Paper Company, a Corporation, for Writs of Certiorari, directed to the Circuit Court of Appeals for the Ninth Circuit, respectfully shows:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The controversy herein arises out of additional income taxes claimed by the Commissioner of Internal Revenue from National Paper Products Company and Zellerbach Paper Company for the fiscal year ended April 30, 1925.

The two cases, hereinabove noted, were jointly tried before the United States Board of Tax Appeals, and a joint decision against the taxpayers was rendered therein (R. 87).*

Petitions to review the two orders of the Board of Tax Appeals were filed with the Circuit Court of Appeals for the Ninth Circuit. Here also, the two cases were jointly briefed and argued; a joint opinion was rendered (R. 94), but a separate judgment was rendered in each case, affirming the Orders of the Board of Tax Appeals.

On July 15, 1925, Zellerbach Paper Company, one of the Petitioners herein, filed a Consolidated Income

*This is a joint Petition by the two Petitioners hereinabove named. All references are to the record in National Paper Products Company v. Commissioner of Internal Revenue, C. C. A. No. 7140, unless otherwise noted.

Tax Return for the fiscal year ended April 30, 1925, with the Collector of Internal Revenue, San Francisco, California, on behalf of itself and its wholly owned subsidiaries, National Paper Products Company (one of the Petitioners herein) and Sanitary Products Corporation, the latter corporation having been operated at a loss.

At the time of the filing of the consolidated return referred to, to-wit, July 15, 1925, the Revenue Act of 1924, c. 234, 43 Stat. 253, was in force. Under the provisions of this Act (Section 277 (a) (1) thereof) the time within which the Commissioner could assess additional taxes for the fiscal year in question, in the absence of fraud (Section 278 (a)), was four years after the return was filed. The Commissioner conceded there was no fraud (R. 19).

In the event of the mailing by the Commissioner of a so-called sixty-day letter under Section 274 (a), the time to make an assessment was extended (Section 277 (b)).

The tax reported in the consolidated income tax return hereinabove referred to, in the sum of $158,374.05 was thereafter paid (R. 22, 94). The return was used by the Commissioner as a basis for an audit of the taxpayers' affairs.

Thereafter, to-wit, on February 26, 1926, the Revenue Act of 1926, c. 27, 44 Stat. 9, was adopted.

Thereafter, on February 28, 1926, the Commissioner of Internal Revenue issued Treasury Decision 3843, reading as follows (see Cumulative Bulletin V-1, Jan.-June, 1926, p. 99):

> "Any corporation which has filed a return for a fiscal year ending in 1925 and paid or become liable for a tax computed under the Revenue Act of 1924, and is subject to additional tax for the same period under the Revenue Act of 1926, must file a new return covering such additional tax on or before May 15th, 1926. Payment of the additional tax may be made at the time the return is filed or, if installment payments are desired, such installments must be paid at the time they would be due if based upon a return for the fiscal year ended February 28th, 1926."

A copy of the above decision was mailed to the Zellerbach Paper Company by the Collector of Internal Revenue at San Francisco, California (R. 23).

The 1924 Revenue Act, c. 234, 43 Stat. 253 (Section 230 thereof), in effect at the time of the filing of the original consolidated return, i. e., July 15, 1925, provided for a tax of 12½% upon the net income of a corporate taxpayer.

The Revenue Act of 1926, c. 27, 44 Stat. 9, Section 230 (a) (1) thereof, increased the rate of tax applicable to corporations from 12½% to 13%. This provision was retroactive to January 1, 1925 (Section 1200 (a)).

This change in the rate of tax affected Zellerbach Paper Company and its subsidiaries for the last third of its fiscal year, i. e., from January 1, 1925 to April 30, 1925. By reason of the change in the rate of tax, two-thirds of the net income of Zellerbach Paper Company and its subsidiaries was subject to the 12½%

rate, and one-third of such net income was subject to the 13% rate.

In accordance with the requirements of Treasury Decision 3843, hereinabove quoted, Zellerbach Paper Company filed an Amended Return on behalf of itself and its subsidiaries on May 14, 1926. This Amended Return was filed on Form 1120-A (prepared and furnished by the Treasury Department).

No schedules were attached to this Amended Return and no data were set forth therein except that in line 25, net income of $1,266,992.39 was set forth. This was the same amount of net income shown on the original return filed July 15, 1925 (R. 23).

The sole purpose in filing the Amended Return on May 14, 1926, was to make the necessary computations showing the additional amount of tax due on account of the increase in the rate as hereinabove set forth. These computations showed an additional tax due in the sum of $2111.65, which amount was paid at the time of filing the Amended Return (R. 96, 97).

The 1926 Revenue Act not only changed the rate of tax applicable to corporate taxpayers, but also reduced the period within which an assessment might be made by the Commissioner, from four years to three years after the return was filed (c. 27, 44 Stat. 9, Section 277 (a) (1)). In the event of the issuance of the so-called sixty-day letter under Section 274 of the 1926 Act, the time was extended (Section 277 (b)).

This part of the 1926 Act was also retroactive to January 1, 1925 (Section 1200 (a)).

The United States Board of Tax Appeals in its opinion rendered herein (R. 21, 24) and the Circuit Court of Appeals for the Ninth Circuit, in its opinion (R. 94, 105) held the three year statute applies to the instant cases, which we understand the Government agrees to.

Deficiency notices under Section 274 of the 1926 Act were mailed to the taxpayers on October 10, 1928 (R. 10; R.—C. C. A. No. 7141, p. 36).

For convenience, we repeat the important dates:

July 15, 1925: Consolidated Income Tax Return filed by Zellerbach Paper Company and its subsidiaries, for the fiscal year ended April 30, 1925;

February 26, 1926: Revenue Act of 1926 adopted, increasing the rate of tax applicable to corporations, from 12½% to 13%, and reducing the statutory period within which the Commissioner might make an assessment from four years to three years, both changes being retroactive to January 1, 1925;

May 14, 1926: Amended Income Tax Return filed by Zellerbach Paper Company and its subsidiaries;

October 10, 1928: Date of mailing deficiency notices by the Commissioner under Section 274 of the Revenue Act of 1926.

It is obvious from the above that on the date of the mailing of the deficiency notices on October 10, 1928, under Section 274 of the 1926 Act, (a) less than four years (the period provided in the 1924 Act) from the date of the filing of the original return on July 16, 1925, had elapsed; (b) more than three years (the

period provided in the 1926 Act) from the date of the filing of the original return on July 16, 1925, had elapsed; and (c) less than three years had elapsed from the date of the filing of the Amended Return on May 14, 1926.

It is the contention of the Petitioners herein that the three year period as provided in the 1926 Revenue Act applies (this we understand is agreed to by the Government); also that the filing of the original return on July 15, 1925, started the three year statutory period in motion by reason of the provisions of the 1926 Act (Section 1200 (a)) making the pertinent portions thereof retroactive to January 1, 1925.

It was admitted that the amounts claimed are due unless barred by the Statute of Limitations (R. 97). It was also stipulated that the sole question is as to whether or not the Commissioner is barred from assessing and collecting additional taxes by reason of the Statute of Limitations (R. 88, 94).

B.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRITS.

(1) The Circuit Court of Appeals for the Ninth Circuit has held in the instant cases that a consolidated Income Tax Return filed on July 15, 1925, and in strict conformity with the Revenue Act of 1924 in force at that time, did not become a return under the Revenue Act of 1926 adopted on February 26, 1926, despite the fact the pertinent portions of the 1926

Revenue Act were made retroactive to January 1, 1925 (R. 94).

The Court also held the filing of this return did not set in motion the statutory period of three years provided by the Revenue Act of 1926 (Section 277 (a) (1)).

As a necessary result of the above, the court held the filing of an Amended Return on May 14, 1926, had the effect of extending the statutory period which would ordinarily have expired on July 15, 1928. This resulted in the further holding that the Commissioner's deficiency letters were timely although not issued until October 10, 1928, more than three years after the filing of the original return on July 15, 1925, despite the provisions of Section 277 (a) (1) of the 1926 Act, supra.

The decision of the Circuit Court of Appeals for the Ninth Circuit on the above questions is in direct conflict with decisions on the same questions (except for the years and the Revenue Acts involved), by the Circuit Court of Appeals for the Fifth Circuit in *Myles Salt Company v. Commissioner* (1931), 49 Fed. (2d) 232, and by the Circuit Court of Appeals for the Eighth Circuit in *Valentine-Clark Company v. Commissioner* (1931), 52 Fed. (2d) 346, and by the Court of Appeals of the District of Columbia in *Isaac Goldmann Company v. Burnet* (1931), 51 Fed. (2d) 427.

The prevailing opinion of the United States Board of Tax Appeals in the instant cases recognized the applicability of the three cases hereinabove referred to but refused to follow them (R. 24).

The dissenting opinion of the Board of Tax Appeals also recognized the applicability of these cases, and stated they should be followed (R. 28).

The Circuit Court of Appeals for the Ninth Circuit in its opinion filed in the instant cases, also recognized the questions involved in the three cases hereinabove referred to were the same as here (R. 94 at 110). The Court states in connection therewith:

> "In the companion case (No. 7209) we have held that a return filed under the Revenue Act of 1918 could not be considered a return under the Revenue Act of 1921, if it did not show the deductions as authorized by the Act of 1921, although in the particular case involved the statutory deduction of $2000 was the only change made in the return of the particular taxpayer. We have declined with all due respect to follow decisions to the contrary by coordinate courts. These decisions are pressed upon us here as a ground for reversing the action of the Board of Tax Appeals. It is not disputed by the Commissioner that the principle of those decisions is applicable to the case in hand. If by reason of the fact that the Commissioner by a mere computation applied to the return filed under the Revenue Act of 1918 can determine the proper tax levied by the Act of 1921 on petitioner's income, a new return is unnecessary, then a new return is unnecessary in the case at bar. Indeed, the decisions above referred to apply with more force to the case at bar where the only question involved is a matter of computation of a tax at a new rate than to a case where the question under consideration is a deduction which a statute expressly requires be shown by the taxpayer in his return as fixed by the law

applicable to the taxation of the income shown in the return."

(2) An additional reason why the Writs of Certiorari should be granted is that an important question of Federal law has been decided by three Circuit Courts of Appeals and by the Court of Appeals of the District of Columbia, and has not been, but should be, settled by this Court.

The questions decided, and the Courts deciding them, are set forth in subdivision (1) of the heading "Reasons Relied on for the Allowance of the Writs".

(3) A third reason why the Writs of Certiorari should be granted is that the Circuit Court of Appeals for the Ninth Circuit, has decided a Federal question in a way probably in conflict with applicable decisions of this Honorable Court.

The effect of the decision of the Circuit Court of Appeals for the Ninth Circuit in the instant cases is that the filing of an Amended Income Tax Return on May 14, 1926 extended the statutory period within which an assessment might be made by the Commissioner. The original Income Tax Return was filed July 15, 1925; the period of limitations applicable thereto was three years (Revenue Act of 1926, Section 277 (a) (1) thereof); the three year period expired July 15, 1928; the Court held, however, that the three year period would not expire until May 14, 1929, three years after the filing of the Amended Return (see opinion, R. 94 at 105).

This holding is contra to the decision of this Honorable Court in *Florsheim Bros. v. U. S.* (1930), 280 U. S. 453, 462; 50 Sup. Ct. Rep. 215, 218; 74 L. Ed. 542, 548.

Wherefore, your Petitioners respectfully pray that Writs of Certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Ninth Circuit commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, full and complete transcripts of the records and proceedings in the cases numbered and entitled on its docket No. 7140, National Paper Products Company, a Corporation, Petitioner, v. Guy T. Helvering, as Commissioner of Internal Revenue, Respondent; No. 7141, Zellerbach Paper Company, a Corporation, Petitioner, v. Guy T. Helvering, as Commissioner of Internal Revenue, Respondent, and that the said judgments and each of them of the said Circuit Court of Appeals for the Ninth Circuit may be reversed by this Honorable Court, and that your Petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your Petitioners will ever pray.

Dated, San Francisco, California,
May 4, 1934.

NATIONAL PAPER PRODUCTS COMPANY,
ZELLERBACH PAPER COMPANY,
By JOHN FRANCIS NEYLAN,
J. PAUL MILLER,
Attorneys for Petitioners.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1933

NOS.

NATIONAL PAPER PRODUCTS COMPANY
(a Corporation),
Petitioner,

vs.

GUY T. HELVERING, as Commissioner of Internal Revenue,
Respondent.

ZELLERBACH PAPER COMPANY
(a Corporation),
Petitioner,

vs.

GUY T. HELVERING, as Commissioner of Internal Revenue,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

I.

OPINION OF THE COURT BELOW.

As heretofore pointed out, the Circuit Court of Appeals for the Ninth Circuit rendered a joint opinion in the two cases herein on February 28, 1934. This opinion has not been reported. It is printed in the Record, beginning at page 94.

A joint opinion (and a joint dissenting opinion) were also rendered by the United States Board of Tax Appeals, and reported in 26 B. T. A. 92.

II.

JURISDICTION.

1. The jurisdiction of this Court is invoked under subdivisions (a) and (c) of Section 240, amended, of the Judicial Code (U. S. C. A. title 28, sec. 347; Mar. 3, 1891, c. 517, sec. 6, 26 Stat. 828; Mar. 3, 1911, c. 231, sec. 240, 36 Stat. 1157; Feb. 13, 1925, c. 229, sec. 1, 43 Stat. 938).

2. Although a joint opinion was rendered, separate judgments were filed in the two cases. See National Paper Products Company v. Helvering, C. C. A. No. 7140 at page 112; Zellerbach Paper Company v. Helvering, C. C. A. No. 7141, at page 89.

3. As heretofore pointed out in our Petition for Writs of Certiorari and under the heading, Reasons Relied on for the Allowance of the Writs (see page 7 supra), there is a clear conflict between the decisions of the Circuit Court of Appeals for the Ninth Circuit

in the instant cases and other courts of coordinate jurisdiction. Supreme Court Rule 38, subdivision 5 (b) provides for the granting of a Petition for Certiorari within the discretion of this Court, where such conflict exists.

4. In the following cases Petitions for Writs of Certiorari were granted where a conflict between different Circuit Courts of Appeals existed:

Magnum Import Co. v. Coty (1923), 262 U. S. 159, 163; 43 Sup. Ct. Rep. 531, 532; 67 L. Ed. 922, 924;

Sanitary Refrigerator Co. v. Winters (1928), 278 U. S. 587; 49 Sup. Ct. Rep. 17; 73 L. Ed. 521; and see

Sanitary Refrigerator Co. v. Winters (1929), 280 U. S. 30, 34; 50 Sup. Ct. Rep. 9, 10; 74 L. Ed. 147, 152;

Hamilton-Brown Shoe Company v. Wolf Brothers & Company (1916), 240 U. S. 251, 257; 36 Sup. Ct. Rep. 269; 60 L. Ed. 629, 633 and cases cited.

III.

STATEMENT OF THE CASE.

A full statement of the case has been given under the heading "A" in the Petition (pages 2 to 7 inclusive), and in the interest of brevity, the statement is not repeated at this point.

IV.

SPECIFICATION OF ERRORS.

(a) The Court erred in finding and holding that the collection of the deficiencies in question was not barred by the Statute of Limitations, Revenue Act of 1926, c. 27, 44 Stat. 9, Section 277 (a) (1) thereof.

(b) The Court erred in finding and holding that the three year period of limitations began to run only with the filing of the Amended Return on May 14, 1926.

(c) The Court erred in failing to find and hold that the three year period of limitations commenced to run with the filing of the original return, on July 15, 1925.

(d) The Court erred in failing to hold that the return filed May 14, 1926, was merely an amended return and did not toll the statutory period.

(e) The Court erred in failing to find and hold that the three year period of limitations began to run with the filing of the original return, even though an amended return was filed on May 14, 1926.

(f) The Court erred in failing to find and hold that the return filed July 15, 1925, did not become the return required under the Revenue Act of 1926 upon its adoption February 26, 1926.

(g) The Court erred in finding and holding that the Revenue Act of 1926 required the filing of a new return, where a return had already been filed under the Revenue Act of 1924, where the only requirement

was the making of a new computation by reason of the increase in the tax rate by the 1926 Act.

(h) The Court erred in affirming the Order of the United States Board of Tax Appeals in National Paper Products Company, a Corporation, Petitioner, v. Guy T. Helvering, as Commissioner of Internal Revenue, Respondent, C. C. A. No. 7140, which Order found that a deficiency was due from the said National Paper Products Company in the sum of $20,657.40 (R. 29).

(i) The Court erred in affirming the Order of the United States Board of Tax Appeals in Zellerbach Paper Company, a Corporation, Petitioner, v. Guy T. Helvering, as Commissioner of Internal Revenue, Respondent, C. C. A. No. 7141, which Order found that a deficiency was due from the said Zellerbach Paper Company in the sum of $7601.55 (R.—C. C. A. No. 7141, P. 26).

V.

ARGUMENT.

POINT A. THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT HAS RENDERED A DECISION CLEARLY IN CONFLICT WITH DECISIONS BY COURTS OF COORDINATE JURISDICTION.

We respectfully refer the Court to our Petition for Writs of Certiorari, heading "B", Reasons Relied on for the Allowance of the Writs (pages 7 to 10). Here we have set forth the questions decided by the Circuit Court of Appeals for the Ninth Circuit, in the instant cases, and have shown the identical questions have been passed upon by the Circuit Courts of Appeals for

the Fifth and the Eighth Circuits, and by the Court of Appeals of the District of Columbia, and that a clear conflict exists between the Circuit Court of Appeals for the Ninth Circuit on the one hand, and the Circuit Court of Appeals for the Fifth and Eighth Circuits, and the Court of Appeals of the District of Columbia, on the other hand. The cases decided contra to the decision in the instant cases are *Myles Salt Company v. Commissioner* (1931), 49 Fed. (2d) 232; *Valentine-Clark Company v. Commissioner* (1931), 52 Fed. (2d) 346; and *Isaac Goldmann Company v. Burnet* (1931), 51 Fed. (2d) 427.

The fact that a clear conflict exists is recognized by the United States Board of Tax Appeals in the prevailing opinion (R. 24) and in the dissenting opinion (R. 28) and by the Circuit Court of Appeals for the Ninth Circuit in its own opinion herein (R. 94, 110).

We rely upon Supreme Court Rule 38, subdivision 5(b) and on the following cases:

Magnum Import Co. v. Coty (1923), 262 U. S. 159, 163; 43 Sup. Ct. Rep. 531, 532; 67 L. ed. 922, 924;

Sanitary Refrigerator Co. v. Winters (1928), 278 U. S. 587; 49 Sup. Ct. Rep. 17; 73 L. ed. 521;

Sanitary Refrigerator Co. v. Winters (1929), 280 U. S. 30, 34; 50 Sup. Ct. Rep. 9, 10; 74 L. ed. 147, 152;

Hamilton-Brown Shoe Company v. Wolf Brothers & Company (1916), 240 U. S. 251, 257; 36 Sup. Ct. Rep. 269; 60 L. ed. 629, 633.

POINT B. AN IMPORTANT QUESTION OF FEDERAL LAW HAS BEEN DECIDED BY THREE CIRCUIT COURTS OF APPEALS, AND BY THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA, AND HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

The general question as to whether or not an Income Tax Return filed in strict conformity to a Revenue Act in force at the time, starts the period of limitation provided in a later Revenue Act, if additional taxes are due under the new Revenue Act for the period covered by the return, has been passed upon by the Circuit Court of Appeals for the Fifth, Eighth and Ninth Circuits, and by the Court of Appeals of the District of Columbia.

The Circuit Court of Appeals for the Fifth Circuit has passed on the question in *Myles Salt Company v. Commissioner* (1931), 49 Fed. (2d) 232; the Circuit Court of Appeals for the Eighth Circuit has passed upon the question in *Valentine-Clark Company v. Commissioner* (1931), 52 Fed. (2d) 346, and the Circuit Court of Appeals for the Ninth Circuit has passed on the question in the instant cases, and in three companion cases in which a Petition for Writs of Certiorari is being filed concurrently herewith.* The question has also been passed upon by the Court of Appeals of the District of Columbia in *Isaac Goldmann Company v. Burnet* (1931), 51 Fed. (2d) 427.

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*The three companion cases are Zellerbach Paper Company v. Commissioner of Internal Revenue, C. C. A. 9, No. 7209; Zellerbach Paper Company, as Transferee of A. S. Hopkins Company v. Commissioner of Internal Revenue, C. C. A. 9, No. 7210; and National Paper Products Company v. Commissioner of Internal Revenue, C. C. A. 9, No. 7211.

In the above cases (other than the instant cases) the Courts were considering the Revenue Act of 1918, c. 18, 40 Stat. 1057, and the Revenue Act of 1921, c. 126, 42 Stat. 227. The 1921 Act eliminated the corporate exemption allowed by the 1918 Act where the income for the taxable year in question exceeded $25,000. This resulted in an increase in the tax (see 1918 Act, section 236(c); see 1921 Act, section 236(b)).

In the instant cases, the Revenue Act of 1924, c. 234, 43 Stat. 253, and the Revenue Act of 1926, c. 27, 44 Stat. 9, are involved, and the increase in the tax is caused by an increase in the rate of tax applicable to these taxpayers in the 1926 Act. The same principle is involved, however, and this is recognized by the United States Board of Tax Appeals in its prevailing opinion (R. 24), and in the dissenting opinion (R. 28), and by the Circuit Court of Appeals for the Ninth Circuit in its opinion (R. 94, 110). We respectfully submit that the questions involved should be passed upon by this Honorable Court.

POINT C. A THIRD REASON WHY THE WRITS OF CERTIORARI SHOULD BE GRANTED IS THAT THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT HAS DECIDED A FEDERAL QUESTION IN A WAY PROBABLY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS HONORABLE COURT.

The effect of the decision of the Circuit Court of Appeals for the Ninth Circuit in the instant cases is that the filing of an Amended Income Tax Return tolls the running of the Statute of Limitations.

The original return was filed herein on July 15, 1925. The statutory period within which an assessment could be made by the Commissioner was four years at the time of the filing of this return. Revenue Act of 1924, c. 234, 43 Stat. 253, Section 277(a) (1). This period was reduced to three years by Section 277(a) (1) of the 1926 Revenue Act, c. 27, 44 Stat. 9.

After the adoption of this latter Act, and in compliance with the requirements of Treasury Decision 3843, to-wit, on May 14, 1926, the taxpayers herein filed an Amended Income Tax Return.

The Circuit Court of Appeals for the Ninth Circuit has held in the instant cases the original return did not start the running of the statutory period but that such period was set in motion only by the filing of the Amended Return.

This is in conflict with the holding of this Honorable Court in *Florsheim Bros. v. U. S.* (1930), 280 U. S. 453, 462; 50 Sup. Ct. Rep. 215, 218; 74 L. ed. 542, 548.

VI.

CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that the decisions of the Circuit Court of Appeals for the Ninth Circuit should be made to conform to decisions of Courts of coordinate jurisdiction, and that to such an end Writs of Certiorari should be granted and this Court should

review the decisions of the Circuit Court of Appeals for the Ninth Circuit and finally reverse them.

Dated, San Francisco, California,
May 4, 1934.

NATIONAL PAPER PRODUCTS COMPANY,
ZELLERBACH PAPER COMPANY,
By JOHN FRANCIS NEYLAN,
J. PAUL MILLER,
Attorneys for Petitioners.

(Appendix Follows.)

Appendix

PERTINENT PARTS OF THE REVENUE ACT OF 1924, c. 234, 43 STAT. 253.

Sec. 239(a). Every corporation subject to taxation under this title shall make a return, stating specifically the items of its gross income and the deductions and credits allowed by this title. * * *

Sec. 241(a). Returns of corporations shall be made at the same time as is provided in subdivision (a) of section 227. * * *

Sec. 227(a). Returns (except in the case of nonresident aliens) shall be made on or before the fifteenth day of the third month following the close of the fiscal year, * * *

Sec. 240(a). Corporations which are affiliated within the meaning of this section may, for any taxable year, make separate returns or, under regulations prescribed by the Commissioner with the approval of the Secretary, make a consolidated return of net income for the purpose of this title, in which case the taxes hereunder shall be computed and determined upon the basis of such return. * * *

Sec. 230. In lieu of the tax imposed by section 230 of the Revenue Act of 1921 there shall be levied, collected, and paid for each taxable year upon the net income of every corporation a tax of 12½ per centum of the amount of the net income in excess of the credits provided in sections 236 and 263.

Sec. 277(a). Except as provided in section 278 and in subdivision (b) of section 274 and in subdivision (b) of section 279:

(1) The amount of income, excess-profits, and war-profits taxes imposed by the Revenue Act of 1921, and by such Act as amended, for the taxable year 1921 and succeeding taxable years, and the amount of income taxes imposed by this Act, shall be assessed within four years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period.

Sec. 277(b). The period within which an assessment is required to be made by subdivision (a) of this section in respect of any deficiency shall be extended (1) by 60 days if a notice of such deficiency has been mailed to the taxpayer under subdivision (a) of section 274 and no appeal has been filed with the Board of Tax Appeals, or, (2) if an appeal has been filed then by the number of days between the date of the mailing of such notice and the date of the final decision by the Board.

Sec. 278(a). In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

Sec. 274(a). If, in the case of any taxpayer, the Commission determines that there is a deficiency in respect of the tax imposed by this title, the taxpayer, except as provided in subdivision (d), shall be notified of such deficiency by registered mail, but such deficiency shall be assessed only as hereinafter provided. Within 60 days after such notice is mailed the tax-

payer may file an appeal with the Board of Tax Appeals established by section 900.

PERTINENT PARTS OF THE REVENUE ACT OF 1926, c. 27, 44 STAT. 9.

Sec. 239(a). Every corporation subject to taxation under this title shall make a return, stating specifically the items of its gross income and the deductions and credits allowed by this title. * * *

Sec. 241(a). Returns of corporations shall be made at the same time as is provided in subdivision (a) of section 227, * * *

Sec. 227(a). Returns (except in the case of nonresident aliens) shall be made on or before the fifteenth day of the third month following the close of the fiscal year, * * *

Sec. 240(a). Corporations which are affiliated within the meaning of this section may, for any taxable year, make separate returns or, under regulations prescribed by the Commissioner with the approval of the Secretary, make a consolidated return of net income for the purpose of this title, in which case the taxes thereunder shall be computed and determined upon the basis of such return. * * *

Sec. 230(a). In lieu of the tax imposed by section 230 of the Revenue Act of 1924, there shall be levied, collected, and paid for each taxable year upon the net income of every corporation, a tax at the following rates:

(1) For the calendar year 1925, 13 per centum of the amount of the net income in excess of the credits provided in sections 236 and 263.

Sec. 277(a). Except as provided in section 278:

(1) The amount of income taxes imposed by this Act shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

Sec. 277(b). The running of the statute of limitations provided in this section or in section 278 on the making of assessments and the beginning of distraint or a proceeding in court for collection, in respect of any deficiency, shall (after the mailing of a notice under subdivision (a) of section 274) be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court, and for 60 days thereafter.

Sec. 274(a). If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (d) or (f) of this section or in sections 279, 282, or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no dis-

traint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. * * *

Sec. 278(a). In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

Sec. 1200(a). The following parts of the Revenue Act of 1924 are repealed, to take effect (except as otherwise provided in this Act) upon the enactment of this Act, subject to the limitations provided in subdivision (b):

Title II (called "Income Tax") as of January 1, 1925, except section 257 and sections 271 to 282, inclusive;

Section 257 and sections 271 to 282, inclusive (being certain administrative provisions of the income tax);
* * *

In the Supreme Court

OF THE

United States

SEP 24

CHARLES ELMO

OCTOBER TERM, 1934

Nos. 35-36

NATIONAL PAPER PRODUCTS COMPANY (a corporation),

Petitioner,

vs.

GUY T. HELVERING, as Commissioner of Internal Revenue,

Respondent.

ZELLERBACH PAPER COMPANY (a corporation),

Petitioner,

vs.

GUY T. HELVERING, as Commissioner of Internal Revenue,

Respondent.

BRIEF FOR PETITIONERS.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

JOHN FRANCIS NEYLAN,
J. PAUL MILLER,
No. 1 Montgomery Street, San Francisco, California,
Attorneys for Petitioners.

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In the Supreme Court

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Respondent.

BRIEF FOR PETITIONERS.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

OPINIONS BELOW.

This proceeding comes before this Court on writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit to review judgments of that Court in the two cases above noted.

These judgments are found in No. 35, R. 112, and No. 36, R. 89.

A joint opinion, affirming the decision of the United States Board of Tax Appeals was rendered by the Circuit Court of Appeals and reported in 69 F. (2d) 857. It is printed in No. 35, R. 94.

A joint opinion was rendered by the Board of Tax Appeals and is found in 26 B. T. A. 92. It is printed in No. 35, R. 21. A dissenting opinion was also filed (No. 35, R. 28).

JURISDICTION.

The judgments of the Circuit Court of Appeals in the two cases were entered on February 28, 1934 (No. 35, R. 112; No. 36, R. 89).

A single petition for a Writ of Certiorari in each case was filed on May 10, 1934, and the writs were granted June 4, 1934 (No. 35, R. 117; No. 36, R. 92).

Jurisdiction rests on subdivisions (a) and (c) of Section 240, amended, of the Judicial Code (U. S. C. A. title 28, Sec. 347; Mar. 3, 1891, c. 517, Sec. 6, 26 Stat. 828; Mar. 3, 1911, c. 231, Sec. 240, 36 Stat. 1157; Feb. 13, 1925, c. 229, Sec. 1, 43 Stat. 938).

STATEMENT OF THE CASE.

This is a joint brief in support of petitioners in the two cases involved.

Zellerbach Paper Company, one of the Petitioners herein, is a California corporation, with its principal place of business at San Francisco, California. National Paper Products Company, the other Petitioner, is also a California corporation, and it, together with Sanitary Products Corporation, was a subsidiary of Zellerbach Paper Company during the taxable period involved.

On July 15, 1925, at which time the 1924 Revenue Act (43 Stat. 253) was in force, the Zellerbach Paper Company filed a consolidated income tax return on behalf of itself and its two subsidiaries, above named, with the Collector of Internal Revenue at San Francisco, California (No. 35, R. 22). This consolidated return covered the fiscal year of the corporations in question, beginning May 1, 1924, and ending on April 30, 1925. The original document is before this Court for its inspection. The tax reported therein was thereafter paid.

On February 26, 1926, the Revenue Act of 1926 (44 Stat. 9) became operative. Under Sec. 230 of the Revenue Act of 1924 the net income of corporations was subject to a tax of 12½ per cent; under the 1926 Act, which was retroactive in part (Sec. 281), the net income of corporations was subject to a tax of 13 per cent for the calendar year 1925, and 13½ per cent thereafter (Sec. 230(a)(1)(2)); these rates being in lieu of the 12½ per cent rate under the 1924 Act.

After the enactment of the 1926 Act the Internal Revenue Commissioner furnished the Zellerbach Paper Company with a copy of Treasury Decision 3843 (No. 35, R. 23), which provided that any corporation becoming liable for an additional tax under the 1926 Act should file a new return, and also a form designated as "U. S. Internal Revenue Form 1120A Revised, April, 1926" (No. 35, R. 77).

In accordance with the instructions contained in Treasury Decision 3843 (printed herein at page 11) the Zellerbach Paper Company, having theretofore filed a consolidated income tax return on behalf of itself and its two subsidiaries above named, supplied the Commissioner with the additional information as called for in Internal Revenue Form 1120A. This original document is also before this Court for its inspection.

This document, which we shall characterize as an "Amended Return", inasmuch as the Commissioner himself so designated it (No. 35, R. 78), was filed with the Collector of Internal Revenue at San Francisco, California, on May 14, 1926 (No. 35, R. 23).

This amended return sets forth the net income for the fiscal year ended April 30, 1925, as reported by the Zellerbach Paper Company on behalf of itself and its subsidiaries *as per its original return;* it also designates that portion of the fiscal year in question falling in the year 1924; the portion falling in the year 1925; and applies the new rate, to-wit, 13 per cent to that part of the net income of the corporations attributable to 1925, and makes the necessary computations show-

ing, by reason of the change in the rate, an additional tax of $2111.65. This additional tax was paid at the time of the filing of the return (No. 35, R. 97).

Thereafter, the Commissioner of Internal Revenue made an audit of the books of the Zellerbach Paper Company, based upon the original and amended returns above mentioned, and determined that additional tax was due for the period in question in the sum of $28,258.95, and that this tax was allocable to the parent company and its two subsidiaries as follows:

Additional tax due from Zellerbach Paper Company	$ 7,601.55
Additional tax due from National Paper Products Company	20,657.40
Additional tax due from Sanitary Products Corporation	None

(No. 35, R. 41.)

The deficiency notices were mailed October 10, 1928, a period of approximately three years and three months after the original return was filed on July 15, 1925, but less than three years after the "amended return" was filed, on May 14, 1926 (No. 35, R. 39; No. 36, R. 36).

Section 277(a)(1) of the 1926 Act (44 Stat. 9) provides for a three year statute of limitations after the filing of the return. This three year statutory period was applicable to the cases herein (No. 35, R. 24, 99, 105).

The deficiency notices (dated October 10, 1928) were obviously mailed more than three years after the filing

of the original return on July 15, 1925, and less than three years after the filing of the amended return on May 14, 1926.

The statute of limitations under Section 277(a)(1) of the 1924 Act (43 Stat. 253) was four years.

There were no changes in the 1926 Act resulting in an increase in tax, other than the increase in the tax rate from 12½ per cent to 13 per cent, this change affecting only the last four months of the fiscal year in question. See Opinion of the Circuit Court of Appeals for the Ninth Circuit, in No. 35, R. 100, 101. The Opinion recites this was conceded by the Commissioner.

SPECIFICATION OF ERRORS.

As set forth in our brief in support of our petition for writs of certiorari, we respectfully submit the Circuit Court of Appeals for the 9th Circuit, erred in the following particulars:

(A) In finding and holding that the collection of the deficiencies in question was not barred by the Statute of Limitations, Revenue Act of 1926, 44 Stat. 9, Section 277(a)(1) thereof.

(B) In finding and holding that the three year period of limitations began to run only with the filing of the Amended Return on May 14, 1926.

(C) In failing to find and hold that the three year period of limitations commenced to run with the filing of the original return, on July 15, 1925.

(D) In failing to hold that the return filed May 14, 1926, was merely an amended return and did not toll the statutory period.

(E) In failing to find and hold that the three year period of limitations began to run with the filing of the original return, even though an amended return was filed on May 14, 1926.

(F) In failing to find and hold that the return filed July 15, 1925, did not become the return required under the Revenue Act of 1926 upon its adoption February 26, 1926.

(G) In finding and holding that the Revenue Act of 1926 required the filing of a new return, where a return had already been filed under the Revenue Act of 1924, where the only requirement was the making of a new computation by reason of the increase in the tax rate by the 1926 Act.

(H) In affirming the Order of the United States Board of Tax Appeals in National Paper Products Company, a corporation, Petitioner, v. Guy T. Helvering, as Commissioner of Internal Revenue, Respondent, C. C. A. No. 7140, which Order found a deficiency in the sum of $20,657.40 (No. 35, R. 29.)

(I) In affirming the Order of the United States Board of Tax Appeals in Zellerbach Paper Company, a Corporation, Petitioner, v. Guy T. Helvering, as Commissioner of Internal Revenue, Respondent, C. C. A. No. 7141, which Order found a deficiency in the sum of $7601.55 (No. 36, R. 26).

SUMMARY OF ARGUMENT.

(1) The consolidated return filed on July 15, 1925, by Zellerbach Paper Company, on behalf of itself and its subsidiaries, complied strictly with the 1924 Revenue Act in force at that time. The Commissioner admits the good faith of the taxpayers herein in the preparation and filing of this return (No. 35, R. 19).

(2) The additional return filed by these taxpayers on May 14, 1926, after the adoption of the 1926 Revenue Act, was merely an "amendment" to the original return. The original return and the amended return became the return required under the 1926 act. The cases hold that the filing of an amended return does not extend the statutory period.

(3) The "Income Tax" provisions of the 1926 Revenue Act were made retroactive (with unimportant exceptions) to January 1, 1925 (Sec. 286). Similar provisions of the 1924 Act were *repealed* as of the same date. Included in that part of the 1926 law retroactively effective as of January 1, 1925, was section 277 providing for a three year statute of limitations applying to taxes "imposed by this Act". The statutory period within which deficiency notices could be mailed was three years after the filing of the original return on July 15, 1925.

(4) The question involved herein is substantially the same as that in the companion cases pending before this Court (Nos. 37 to 39).

QUESTION PRESENTED.

The sole question is limitation, i. e., whether the Commissioner was barred on November 10, 1928, when he mailed deficiency notices to the taxpayers herein. The determination of this question is dependent upon whether the statutory period of three years was set in motion on July 15, 1925, the date of the filing of the original return, or only on May 14, 1926, the date of the filing of the "Amended Return".

ARGUMENT.

(1) THE CONSOLIDATED RETURN FILED ON JULY 15, 1925, BY ZELLERBACH PAPER COMPANY, ON BEHALF OF ITSELF AND ITS SUBSIDIARIES, COMPLIED STRICTLY WITH THE 1924 REVENUE ACT IN FORCE AT THAT TIME. THE COMMISSIONER ADMITS THE GOOD FAITH OF THE TAXPAYERS HEREIN IN THE PREPARATION AND FILING OF THIS RETURN (NO. 35, R. 19).

The Zellerbach Paper Company on July 15, 1925, filed a Consolidated Income Tax Return on behalf of itself and its subsidiaries for the fiscal year ended April 30, 1925.

The original return is before this Court for its inspection.

The return is supported by detailed schedules filed in obedience to the requirements of the Revenue Act of 1924 in effect at the time of filing.

The return was intended to convey all necessary information to the Commissioner to enable him to determine whether the correct amount of tax had been reported. The best evidence of the completeness of

the return is that the Commissioner used the return (and the amended return) as the basis for his extensive audit.

The good faith and honesty of the taxpayers herein have not been questioned (No. 35, R. 19).

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(2) THE "RETURN" FILED AFTER THE ADOPTION OF THE 1926 REVENUE ACT WAS MERELY AN AMENDMENT TO THE ORIGINAL RETURN. THIS ORIGINAL RETURN AND THE AMENDMENT THERETO BECAME THE RETURN REQUIRED UNDER THE 1926 REVENUE ACT.

After the filing of the original return on July 15, 1925, to-wit, on February 26, 1926, the Revenue Act of 1926 was adopted. The rate of tax against corporate taxpayers under the Act of 1924 was 12½ per cent (Section 230).

The 1926 Act (Sec. 230(a)(1)(2)) provided for a rate of 13 per cent, beginning on January 1, 1925, for the calendar year 1925, and 13½ per cent thereafter.

The fiscal year of the taxpayers herein ended April 30, 1925.

As a result of this change in the 1926 Act, the reported income of these taxpayers was subjected to an additional one-half of one per cent, the additional tax amounting to $2111.65.

No other changes in the 1926 Act affected the return of these taxpayers filed prior to the adoption of the new Act (No. 35, R. 100, 101).

On February 28, 1926 (after the adoption of the 1926 Act) the Commissioner of Internal Revenue issued his Treasury Decision 3843, reading as follows:

"Treasury Decision 3843.

"To Collectors of Internal Revenue and others concerned:

"Any corporation which has filed a return for a fiscal year ending in 1925 and paid or become liable for a tax computed under the Revenue Act of 1924, and is subject to additional tax for the same period under the Revenue Act of 1926, must file a new return covering such additional tax on or before May 15, 1926. Payment of the additional tax may be made at the time the return is filed or, if installment payments are desired, such installments must be paid at the time they would be due if based upon a return for the fiscal year ended February 28, 1926.

D. H. Blair,

Commissioner.

Approved April 1, 1926,

Garbrard B. Winston,

Acting Secretary of the Treasury."

(V-1 C-B. 99)

In response to this Treasury Decision and using a form (U. S. Int. Rev. Form 1120A, Revised April 1926) furnished by the Commissioner (No. 35, R. 96) the taxpayers herein rendered their "Amended Return" reporting an additional tax in the sum of $2111.65.

We respectfully invite the attention of this Court to this form; the manner in which it was prepared by the taxpayers; the designation of the return by the Commissioner as "Amended", and the notation thereon, "See Original Return".

We have referred to this document as an "Amended Return" not merely because that is an accurate description of the document, but because the Commissioner himself so designated it (No. 35, R. 128).

Many cases hold that the filing of an amended return does not extend the statutory period.

Some of these cases are collected in *Isaac Goldmann Company v. Burnet,* 51 Fed. (2d) 427, from which the following is taken:

> "It was conceded, in the opinion of the Supreme Court in *Florsheim Brothers v. United States,* 280 U. S. 453, 462, 50 S. Ct. 215, 218, 74 L. Ed. 542, that the filing of a return, though defective or incomplete, is 'sufficient to start the running of the period of limitation; and that the filing of an amended return does not toll the period.' It was likewise held in *Willingham Loan Co. v. Commissioner* (C. C. A. 5), 36 F. (2d) 49, that the statute begins to run whenever the taxpayer has filed returns with the Commissioner which show facts upon which the proper assessment for the taxable period may be made. See, also, *Thomas v. United States* (D. C.), 22 F. (2d) 1000. The Board of Tax Appeals has also held that this is the rule. See *Appeal of National Refining Co., et al.,* 1 B. T. A. 236; *Appeal of New York Trust Co.,* 3 B. T. A. 583; *Lancaster Lens Co. v. Commissioner of Internal Revenue,* 10 B. T. A. 1153."

The language of the Supreme Court in *Florsheim Bros. v. U. S.,* 280 U. S. 453, 462, 74 L. Ed. 542, 548, referred to, supra, is as follows:

> "The word 'return' is not a technical word of art. It may be true that the filing of a return which is defective or incomplete under Sec. 239 is sufficient to start the running of the period of limitation; and that the filing of an amended return does not toll the period. But the defective or incomplete return purports to be a specific statement of the items of income, deductions and credits in compliance with Sec. 239. And, to have that effect, it must honestly and reasonably be intended as such."

It is our contention that the statutory period was set in motion on July 15, 1925, the date of the filing of the original return, and that the time was not extended by the filing of the amended return on May 14, 1926.

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(3) THE "INCOME TAX" PROVISIONS OF THE 1926 REVENUE ACT WERE MADE RETROACTIVE TO JANUARY 1, 1925. SIMILAR PROVISIONS OF THE 1924 ACT WERE REPEALED AS OF THE SAME DATE. SECTION 277 OF THE 1926 ACT PROVIDES FOR A THREE YEAR STATUTE OF LIMITATIONS WHICH BECAME EFFECTIVE JANUARY 1, 1925. THE DEFICIENCY NOTICES HEREIN WERE MAILED MORE THAN THREE YEARS AFTER JULY 15, 1925.

At the time of the filing of the consolidated return on July 15, 1925, the 1924 Revenue Act was in effect.

On February 26, 1926, the 1926 Act was adopted.

Title II of the Act consisted of the "Income Tax" provisions of the law.

Section 286 of the new Act reads as follows:

> "This title shall take effect as of January 1, 1925, except that section 257 and sections 271 to

285 inclusive and this section, shall take effect on the enactment of this Act."

Section 1200 of the new Act reads in part as follows:

"Sec. 1200(a). The following parts of the Revenue Act of 1924 are repealed, to take effect (except as otherwise provided in this Act) upon the enactment of this Act, subject to the limitations provided in subdivision (b):

"Title II (called 'Income Tax') as of January 1, 1925, except section 257 and sections 271 to 282, inclusive;

"Section 257 and sections 271 to 282, inclusive (being certain administrative provisions of the income tax); * * *"

Included within that part of the 1926 Act which became effective January 1, 1925, was section 277, reading in part as follows:

"Sec. 277(a). Except as provided in section 278——

"(1) The amount of income taxes imposed by this Act shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

* * * * * * *

"(5)(b). The running of the statute of limitations provided in this section or in section 278 on the making of assessments and the beginning of distraint or a proceeding in court for collection, in respect of any deficiency, shall (after the mailing of a notice under subdivision (a) of section 274) be suspended for the period during

which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court (and in any event, if a proceeding in respect of the deficiency is placed on the docket of the Board, until the decision of the Board becomes final), and for 60 days thereafter."

Sec. 278 of the new Act reads in part as follows:

"Sec. 278(a). In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time."

Included within the Income Tax provisions of the 1924 Act, repealed as at January 1, 1925, was section 277, providing for a four year statute of limitations.

The repeal of the Income Tax provisions of the 1924 law as of January 1, 1925, and the substitution of the income tax provisions of the 1926 Act as of the same date, including section 277, providing for a three year statute of limitations, resulted, in our opinion, in the adoption of returns filed during 1925, covering fiscal years ending during that year, as returns filed under the 1926 Act. If this be true, then the return filed by the taxpayers herein for the fiscal year ended April 30, 1925, became the return under the 1926 Act. The amendment to this return, filed in compliance with T. D. 3843, did not affect the running of the statutory period within which an additional assessment had to be made. This period was begun, we contend, on the 15th day of July, 1925, and had completely expired prior to the mailing of deficiency notices on October 10, 1928.

(4) THE QUESTION INVOLVED HEREIN IS SUBSTANTIALLY THE SAME AS THAT IN THE COMPANION CASES PENDING BEFORE THIS COURT (NOS. 37 TO 39).

In the companion cases now pending before this Court (Nos. 37-39) the facts are very similar to those outlined herein. In those cases a consolidated return was filed July 16, 1921, for the fiscal year ended April 30, 1921, and during the time the 1918 Revenue Act (40 Stat. 1057) was in force. Thereafter, to-wit, on November 23, 1921, the 1921 Revenue Act (42 Stat. 227) was adopted. The only effect of the adoption of this Act upon the consolidated return filed therein on July 16, 1921, was the elimination of one-third of the $2000 exemption, or credit, allowed corporate taxpayers by section 236 of the 1918 Act.

The newly adopted Act of 1921 was retroactive i. e. the "Income Tax" portion thereof) as of January 1, 1921.

The Commissioner of Internal Revenue issued T. D. 3305 (amended by T. D. 3310) after the adoption of the 1921 Act, providing for the filing of a new return where the new Act provided for additional taxes.

In the instant cases the taxpayers in obedience to T. D. 3843, filed an "Amended Return" or an "amendment" to the original return.

In the companion cases, the taxpayers did *not* file an amended return, or any additional return.

As a result the Commissioner contended (in the companion cases) that the statute of limitations was never set in motion; here the Commissioner admits

the three year statutory period provided by the 1926 Act was set in motion, but contends further, that it was not set in motion until the amended return was filed on May 14, 1926.

It seems to be conceded, however, that the general principle involved in the two groups of cases is the same.

The majority opinion of the Board of Tax Appeals so states (No. 35, R. 24), and the same cases are cited in support of the opinion as are cited in support of the Board's opinion in the companion cases.

Included are *Myles Salt Co.*, 18 B. T. A. 742; reversed, 49 Fed. (2d) 232; *Isaac Goldmann Co.*, 17 B. T. A. 1103; reversed, 51 Fed. (2d) 427; *Valentine-Clark Co.*, 14 B. T. A. 562; reversed, 52 Fed. (2d) 346. (For convenience the opinions in these three cases are printed in full in Appendix B.)

The Board also cites: *Gus Holstine Dry Goods Company v. Commissioner*, 16 B. T. A. 1124; *Adams, Cushing & Foster, Inc. v. Commissioner*, 19 B. T. A. 89; and *G. Corrado Coal & Coke Interests, Inc. v. Commissioner*, 19 B. T. A. 691.

After appeals in these three cases by the taxpayers, the Commissioner confessed error in the first two, and moved to dismiss in the third. The facts in relation to these matters are more fully set forth in our brief in the companion cases (Nos. 37-39).

The dissenting opinion of the Board in the instant cases also concedes the principle involved in the two groups of cases is the same. We quote the dissenting opinion in full (No. 35, R. 28):

"Van Fossan, dissenting: The principle announced in the decisions of the Board on which the prevailing opinion in these cases is predicated has been considered by the Court of Appeals of the District of Columbia and the Circuit Courts of Appeal in three of the cases cited and in each instance the Board has been reversed. Valentine-Clark Co., 14 B. T. A. 562; reversed, 52 Fed. (2d) 346; Isaac Goldmann Co., 17 B. T. A. 1103; reversed, 51 Fed. (2d) 427; Myles Salt Co., 18 B. T. A. 742, reversed, 49 Fed. (2d) 232. On further consideration of the merits of the issue involved, I am convinced that the Board has been in error in all of these cases and that the petitioners should prevail.

"Goodrich agrees with this dissent."

The Circuit Court of Appeals for the 9th Circuit in its opinion in the instant cases (No. 35, R. 110) is in agreement. The Court after referring to the *Myles Salt Company,* the *Isaac Goldmann Company* and *Valentine-Clark Company* cases, supra, says:

"We have declined with all due respect to follow decisions to the contrary by coordinate courts. These decisions are pressed upon us here as a ground for reversing the action of the Board of Tax Appeals. It is not disputed by the Commissioner that the principle of those decisions is applicable to the case in hand. If by reason of the fact that the Commissioner by a mere computation applied to the return filed under the Revenue Act of 1918 can determine the proper tax levied by the Act of 1921 on petitioner's income, a new return is unnecessary, then a new return is unnecessary in the case at bar. Indeed, the deci-

sions above referred to apply with more force to the case at bar where the only question involved is a matter of computation of a tax at a new rate than to a case where the question under consideration is a deduction which a statute expressly requires be shown by the taxpayer in his return as fixed by the law applicable to the taxation of the income shown in the return."

And finally, the Circuit Court of Appeals states:

"We wish to make it clear that unless we are correct in holding that the decisions of our coordinate courts are erroneous this case as well as the companion case should be reversed."

And Commissioner's counsel in his brief filed in the instant case, before the Circuit Court of Appeals for the 9th Circuit, states:

"As in Nos. 7209-7211, we recognize that this question has in substance been decided by three appellate courts, but we insist that those decisions are not here controlling."

We, therefore, respectfully direct the Court's attention to our more extended arguments in support of our position as set forth in our brief Nos. 37-39.

CONCLUSION.

We submit that the repeal of the Income Tax provisions of the 1924 Act as at January 1, 1925, and the substitution of similar provisions of the 1926 Act as at the same date, discloses the intent of Congress to adopt a return such as was filed herein as a return under the 1926 Act.

We submit that the Commissioner had it in mind to adopt a return such as was filed herein as a return under the 1926 Act, this being evidenced by his supplying these taxpayers with a form which was intended merely as an amendment of the original return.

We submit that Congress had the right, and exercised the right, to cut down the statutory period within which an additional assessment might be made (or a deficiency notice mailed), from four years under the 1924 Act, to three years as provided in the 1926 Act; that as a result of this shortening of the statutory period, it was the duty of the Commissioner to make an assessment of the additional taxes claimed, or mail his deficiency notices, within three years from the date of the filing of the original return on July 15, 1925.

And finally, we submit that the Commissioner having failed to take the necessary action within the three year period, he is barred from further proceedings herein.

Dated, San Francisco, California,
September 19, 1934.

Respectfully submitted,
JOHN FRANCIS NEYLAN,
J. PAUL MILLER,
Attorneys for Petitioners.

(Appendices A and B Follow.)

Appendix A

PERTINENT PORTIONS OF THE REVENUE ACT OF 1924 (43 STAT. 253).

"Sec. 230. In lieu of the tax imposed by Section 230 of the Revenue Act of 1921 there shall be levied, collected, and paid for each taxable year upon the net income of every corporation a tax of 12½ per centum of the amount of the net income in excess of the credits provided in Sections 236 and 263."

"Sec. 277(a). Except as provided in Section 278 and in subdivision (b) of Section 274, and in subdivision (b) of Section 279—

"(1) The amount of income, excess-profits, and war-profits taxes imposed by the Revenue Act of 1921, and by such Act as amended, for the taxable year 1921 and succeeding taxable years, and the amount of income taxes imposed by this Act, shall be assessed within four years after the return was filed, and no proceeding in Court for the collection of such taxes shall be begun after the expiration of such period."

PERTINENT PORTIONS OF THE REVENUE ACT OF 1926 (44 STAT. 9).

"Sec. 200. When used in this title—

"Sec. 200 (a). The term 'taxable year' means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed under Section 212 or 232. The term

'fiscal year' means an accounting period of twelve months ending on the last day of any month other than December. The term 'taxable year' includes, in the case of a return made for a fractional part of a year under the provisions of this title or under regulations prescribed by the Commissioner with the approval of the Secretary, the period for which such return is made. *The first taxable year, to be called the taxable year 1925, shall be the calendar year 1925, or any fiscal year ending during the calendar year 1925.*" (Italics supplied.)

"Sec. 207 (c). Any amount paid before or after the enactment of this Act on account of the tax imposed for a fiscal year beginning in 1924 and ending in 1925 by Title II of the Revenue Act of 1924 shall be credited toward the payment of the tax imposed for such fiscal year by this Act, and if the amount so paid exceeds the amount of such tax imposed by this Act, the excess shall be credited or refunded in accordance with the provisions of Section 284."

"Sec. 230 (a). In lieu of the tax imposed by Section 230 of the Revenue Act of 1924, there shall be levied, collected, and paid for each taxable year upon the net income of every corporation, a tax at the following rates:

"Sec. 230 (a) (1). For the calendar year 1925, 13 per centum of the amount of the net income in excess of the credits provided in Sections 236 and 263; and

"Sec. 230 (a) (2). For each calendar year thereafter, 13½ per centum of such excess amount.

"Sec. 277 (a). Except as provided in Section 278—

"Sec. 277 (a) (1). The amount of income taxes imposed by this Act shall be assessed within three years after the return was filed, and no proceeding in Court without assessment for the collection of such taxes shall be begun after the expiration of such period."

TREASURY DECISION 3843.

To Collectors of Internal Revenue and Others Concerned:

Any corporation which has filed a return for a fiscal year ending in 1925 and paid or become liable for a tax computed under the Revenue Act of 1924, and is subject to additional tax for the same period under the Revenue Act of 1926, must file a new return covering such additional tax on or before May 15, 1926. Payment of the additional tax may be made at the time the return is filed or, if installment payments are desired, such installments must be paid at the time they would be due if based upon a return for the fiscal year ended February 28, 1926.

D. H. Blair,
Commissioner.

Approved April 1, 1926,
Garrard B. Winston,
Acting Secretary of the Treasury.

(V-1 C-B. 99)

Appendix B

THE FOLLOWING IS THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT IN MYLES SALT CO. v. COMMISSIONER, 49 FED. (2d) 232, RENDERED ON APRIL 21, 1931:

"The sole question is limitation. On May 16, 1921 (May 15th was Sunday), Myles Salt Company filed its income tax return for its fiscal year ending February 28th, 1921, and paid the tax shown by it, all according to the Revenue Act of 1918 then in force (40 Stats. 1057). On November 23rd, 1921, the Revenue Act of 1921 was approved, effective as to its income tax provisions as of January 1st, 1921 (Section 263), and repealing as of January 1st, 1921, the corresponding provisions of the Revenue Act of 1918 (Section 1400). No change was made affecting the tax of this taxpayer except that, because its net income exceeded $25,000.00, it was deprived since January 1st of the credit of $2000.00 allowed by Section 236 (42 Stat. 257), thus increasing its tax about $35.00. *No new or amended return showing this changed computation was filed or requested.* On September 17, 1926, the Commissioner sent out a deficiency notice preparatory to assessing an additional tax arising mainly from corrections in the deductions claimed for depletion and inventory losses. Before the Board of Tax Appeals the taxpayer claimed that the assessment was barred by the provisions then in force of the Revenue Act of 1926, Section 277 (a) (2), 26 U. S. C. A. 1057 (a) (2), 'The amount of income, excess profits, and war profits taxes imposed by the Revenue Act of 1921, and by such Act as amended, for the taxable year 1921 * * * shall be assessed

within four years after the return was filed'. By Section 200 (1) of the Act of 1921 (42 Stat. 227) the taxable year 1921 included fiscal years ending during 1921. The Board held, three members dissenting, that no lawful return had been filed for the fiscal year in question, and no bar had attached because of Section 278 (a) of the Act of 1926 (26 U. S. C. A. 1058). 'In case of a false or fraudulent return with intent to evade the tax or a failure to file a return the tax may be assessed * * * at any time'.

The return which will date the beginning of the limitation period, and lack of which will prevent limitation, is one made in substantial conformity to the law which required it. The Act of 1918 and that of 1921 in Section 239 (40 Stat. 1081, 42 Stat. 259 both require 'Every corporation * * * shall make a return stating specifically the items of its gross income and the deductions and credits allowed by this title. The return shall be sworn to by the president, vice-president, or other principal officer and by the treasurer or assistant treasurer.' It is no return as respects limitation if made tentatively and not intended to be the basis of an assessment, *Florsheim Brothers v. United States,* 280 U. S. 453, 50 S. Ct. 215, 74 L. Ed. 542; or if not sworn to at all, *Lucas v. Pilliod,* 281 U. S. 245, 50 S. Ct. 297, 74 L. Ed. 829, 67 A. L. R. 1315. It must purport to cover the entire period involved, and must show the items of gross income, deductions and credits of the taxpayer with such definiteness as to permit an assessment of the tax, if accepted as correct. *United States v. National Tank & Export Co.* (C. C. A.), 45 Fed. (2d) 1005. *Perfect accuracy*

and completeness is not necessary, for there could rarely be an additional tax assessed except on some correction of the return, and, if the need of correction is held to make it no return, such deficiency assessments would never be barred. If, on the other hand, the return is so false as to show fraud and intent to evade the tax, there is by the special provision above quoted no limitation. The Board found no fraud or bad intent in this return. *If it had been filed or refiled the day after the Act of 1921 was passed, it would have been clearly good; the error in the deductible credit being easily remediable by the Commissioner without further information from the taxpayer.* But it is said that, because it was filed before the Act was passed it cannot be a return under the Act. The Act itself, however, is retroactive, declaring itself to be effective as of January 1, 1921. If in effect on that date for other purposes, why should it not speak from that date as to filing returns? Difficulty can arise only concerning returns for fiscal years ending during 1921. Congress had them in mind, for in Section 205 (a) it was provided: 'If a taxpayer makes return for a fiscal year beginning in 1920 and ending in 1921, his tax under this title for the taxable year 1921 shall be' arrived at on a basis stated. Entirely conscious, therefore, that such returns had already been filed before the Act was passed on November 23rd, the only provision Congress made as to filing them was Section 227 (a): 'Returns * * * shall be made on or before the 15th day of the third month following the close of the fiscal year.' If this requirement is read as of January 1st the return in question was filed in literal compliance with it.

That it was the intent of Congress thus to ratify and adopt returns filed between January 1st and the passing of the Act also appears from its repeal of the former Act as of January 1st, so that there was no law except the Act of 1921 that could apply to such returns. This intent is further shown by the history of the legislation, for this same situation arose when the Act of 1918, approved February 24th, 1919 (40 Stat. 1057), retroactively displaced the Act of 1917. Its Section 227 (a) was identical with that just quoted, and was interpreted by Treasury Decision 2797, whereby fiscal year returns filed before the Act was passed were treated as sufficient, and were referred to as the 'original return', but if an additional tax was due under the new Act 'a return covering such additional tax' only was required, and called an 'amended return.' Thus in no case was the original return treated as a nullity, but as valid so far as it went. By a settled principle Congress is to be considered as having adopted this official construction when it reenacted the same words in the new law. *United States v. G. Falk & Bro.*, 204 U. S. 143, 27 S. Ct. 191, 51 L. Ed. 411; *Stairs et al. v. Peaslee*, 18 Howard 521, 15 L. Ed. 474. Many decisions of the Board of Tax Appeals have held that returns filed before the law was passed are not nullities, but sufficient to date the beginning of limitation if no additional tax was imposed on the particular taxpayer by the law, although the return was actually incorrect and the tax paid insufficient. *Ley & Co., Inc.*, 9 B. T. A. 749; *Palmetto Coal Co.*, 11 B. T. A. 154; *Denholm & McKay Co.*, 15 B. T. A. 225. *This return was retained by the Commissioner, together with the money paid on*

it. An audit of it was had in 1923 without request for any amendment of it. The deficiency letter of September 17th, 1926, states that 'An audit of your income and profits tax return for the fiscal year ended February 28, 1921, has resulted', etc., and the statement attached is based upon the figures of the return; so that the additional tax is proposed to be assessed on the return. These things are mentioned not as raising an estoppel to deny that it is a return, but as further tending to show that it was treated in administrative practice as, and understood to be, a duly filed return and practically sufficient as such until the question of limitation was raised. We hold that limitation is to be dated from its filing on May 16th, 1921. We do not inquire whether the tax for the period prior to January 1st, 1921, which is by Act of 1921, Section 205 (a), to be measured by the provisions of the Act of 1918, is imposed by the one Act or the other, since the limitation period applicable to either had expired when the assessment was attempted. The entire assessment is barred. The petition for review is granted, and the case is remanded for further proceedings not inconsistent herewith."

THE FOLLOWING IS THE DECISION OF THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA IN ISAAC GOLDMANN CO. v. DAVID BURNET, 51 FED. (2d) 427, RENDERED ON JUNE 29, 1931:

"Groner, Associate Justice:

Appellant kept its books and made its tax returns on the fiscal year basis. Its taxable year 1920-1921 was the twelve months' period ending

April 30, 1921. On July following, it filed its return under the provisions of the Revenue Act of 1918 (40 Stat. 1057), showing net income of $82,964.70 and a resulting tax liability of $15,830.26. Gross income was properly shown, the schedules required by Treasury regulations were attached, and the honesty and good faith of the return is not questioned. More than four years later the Commissioner made a deficiency assessment.

On November 23, 1921, the Revenue Act of 1921 was passed, and its provisions made retroactive as of January 1. (Sec. 263, 42 Stat. 227, 271.) The only effect of the 1921 act, so far as it concerned appellant's tax liability for the period January 1 to the end of appellant's fiscal year—April 30, 1921—was to limit proportionately appellant's right to a specific exemption, allowed under the 1918 act but not allowed under the 1921 act, to the period prior to January 1. The result of this was to make appellant liable, under the new act, for a small additional tax. The Commissioner claims that this fact made necessary the filing by appellant of a new return, and that its subsequent filing of an amended return, pursuant to Treasury Decision 3220, should either be treated as the only return for the fiscal year period in controversy, or else appellant should be regarded as never having filed any return, and that, in either case, the deficiency assessment would be within the limitation period.

Treasury Decision 3220, issued the latter part of 1921, was designed to correct a practice apparently then more or less general on the part of taxpayers in using 'appreciated' values in determining invested capital, and required, from such

as had, an amended return within ninety days. The bulletin confined the requirements of the return to such additional information only as should be necessary to show the correct values to redetermine the amount of tax to be assessed. In obedience to this bulletin, and for the purpose only of correcting the item of invested capital as shown in the former returns, appellant, still claiming the 1918 exemption, filed on January 14, 1922, an amended return, and the question which we have to answer is whether the four-year period of limitations began to run with the filing of the original return in July, 1921, because if it did not, the additional assessment is valid. The Board held, following *Hutchinson Co. v. Commissioner,* 14 B. T. A. 367, 8, that because the 1921 Act abolished the $2000 exemption, appellant owed additional taxes under the provisions of that act, and, inferentially at least, since it owed additional taxes, it owed likewise the duty of filing a return with specific reference to the 1921 Act, and that, until it did so, the limitation did not begin to run.

In this conclusion, we find ourselves unable to agree. We can find no provision in the Revenue Act of 1921 which requires the filing of a new return from taxpayers using the fiscal year basis, in cases where a return had been duly filed under existing law, except, perhaps, in those cases in which, under the 1921 Act, new and different taxes are assessed or a new basis of taxation provided, as is the case in some few instances not here involved. *The Commissioner himself realized the confusion and waste inevitable if the returns already made were wholly disregarded and new*

ones required, and, in Treasury Decision 3310, demanded new returns from taxpayers who had, under the 1918 Act, made returns for the fiscal year ending during 1921 only in those cases in which the taxpayer was subject to specific additional taxes under the 1921 Act. The purpose of this ruling, obviously, we think, was to provide a new return only in those cases where, under the provisions of the latter act, a liability for other or additional taxes was created through a change in the basis of computation, necessitating other information or new figures to allow the Commissioner to determine the tax liability under the Act.

In this instance, the taxpayer had filed the return it was required to file under the then prevailing law, and paid the tax. The new law was in all respects the same as the old so far as its tax liability was concerned. The repetition of the figures already filed would have been a wholly vain and useless proceeding. *The elimination of the part of the exemption not allowable after January 1 was a simple computation appearing from the returns filed, and the adjustment of this item to conform to the new law needed neither explanation nor new returns.* The new act provided the occasion, and the return furnished the basis, and the act itself imposed on the Commissioner (250 (b)) Revenue Act 1921, the duty of examination to the end that the correct tax should be ascertained. The retroactive provisions of the 1921 Act present no novelty, for the 1918 Act itself replaced retroactively the 1917 Act. Under the provisions of the 1918 Act, the tax was increased over that exacted under either the 1916 or 1917 Act, but,

under its provisions as to filing returns on the fiscal year basis, the Commissioner ruled (Treasury Decision 2797) that the new return required was satisfied by inclusion only of the items embracing the additional tax, and spoke of the former returns, i. e., those filed before the Act was approved, as original returns, and the additional returns required as supplemental or amended returns, and while we do not invoke this use of words as foreclosing the question or as controlling, we nevertheless think it clearly reflects the real situation, and that, in this aspect, the returns filed by appellant were, especially in view of the admission that they were in all respects honestly believed to represent the true state of appellant's liability, valid returns and not a nullity. *The case turns, we think, upon this: If the original returns filed by appellant were, as the Board apparently thought, a nullity, then, obviously, the deficiency assessment was in time, but if, on the contrary, they were valid returns susceptible of amendment by the Commissioner in the ascertainment of the correct tax, or requiring only a corrected return in eliminating that portion of the exemption which was abolished by the later act, then, equally, obviously, the deficiency assessment was made too late.* It was conceded, in the opinion of the Supreme Court in *Florsheim Brothers v. United States*, 280 U. S. 453, 462, 50 S. Ct. 215, 218, 74 L. Ed. 542, that the filing of a return, though defective or incomplete, is 'sufficient to start the running of the period of limitation; and that the filing of an amended return does not toll the period.' It was likewise held in *Willingham Loan Co. v. Commissioner* (C. C. A. 5), 36 F. (2d) 49, that the statute begins to run

whenever the taxpayer has filed returns with the Commissioner *which show facts upon which the proper assessment for the taxable period may be made.* See also *Thomas v. United States* (D. C.), 22 F. (2d) 1000. The Board of Tax Appeals has also held that this is the rule. See *Appeal of National Refining Co. et al.*, 1 B. T. A. 236; *Appeal of New York Trust Co.*, 3 B. T. A. 583; *Lancaster Lens Co. v. Commissioner of Internal Revenue*, 10 B. T. A. 1153.

To say that the original return filed by appellant in this case is no return, though filed in strict conformity to the law then prevailing is, we think, wholly incorrect. To call the return which it later filed to conform to a ruling of the Department—a thing in itself wholly unresponsive to anything in the 1921 Act—a new return, wholly unrelated to the other, is, we think, equally incorrect. Appellant, under the method which it had adopted with the consent of the Department, was required to file its returns within three months after the expiration of its fiscal year, and to pay its tax. If it had failed to do either, it would have made a default subjecting it to penalty. If it had filed a dishonest report, it would have been subject to still further penalty. As it happened, it did precisely what the law, as it then was, required it to do, and now to say that, because of the retroactive provisions of the new act, what it did was a nullity, is, it seems to us, without justification or support. If more was required, it was supplementary and not original, and hence, as the Supreme Court said, did not toll the statute. We do not mean to say that the Commissioner might not have required the filing of additional returns to make those already filed conform to the new law, but

such new returns, if filed for that purpose, would, as we think, have relation to the original return, and the latter, rather than the former, would be the starting point for the limitation.

The precise question here involved was likewise involved in *Myles Salt Co. v. Commissioner* (decided by the Fifth Circuit C. C. A., April 21, 1931), 49 Fed. (2d) 232, and it was decided there, as we think correctly, that the original return established the period from which the limitations began to run.

Reversed."

THE FOLLOWING IS THE OPINION OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, IN VALENTINE-CLARK CO. v. COMMISSIONER, 52 FED. (2d) 346, RENDERED ON JULY 31, 1931:

"Booth, Circuit Judge, delivered the opinion of the Court.

This is a petition for review of an order of the Board of Tax Appeals which redetermined a deficiency in the income and profits taxes of petitioner for the fiscal year ending January 31, 1921. The determination of the Commissioner of Internal Revenue was upheld.

The facts are not in dispute. The petitioner, taxpayer, kept its books during the taxable period involved on the basis of a fiscal year ending January 31, 1921. April 14, 1921, the taxpayer filed its return for the fiscal year showing a net income of $37,527.43. In due course, it paid taxes on that basis. After the enactment of the Revenue Act of 1921 (November 23, 1921 (42 Stat. 227)), the taxpayer filed no other or further return for the fiscal

year ending January 31, 1921. No waiver of the statutory limitation period on assessment or collection of the 1921 income or profits taxes was executed or filed with the Commissioner of Internal Revenue by the taxpayer. No notice was served upon the taxpayer requiring a further return or statement as provided by Section 1305 of the Revenue Act of 1918 (40 Stat. 1142), and by Section 1307 of the Revenue Act of 1921 (42 Stat. 310). June 3, 1926, the Commissioner mailed to the taxpayer the so-called sixty-day deficiency letter, provided for in Section 274 (a) of the 1926 Revenue Act (26 U. S. C. A. 1048), showing a net income for the fiscal year ending January 31, 1921, of $46,734.04, and a deficiency in tax due from the taxpayer for said fiscal year of $5777.35. No part of said sum of $5777.35 has been assessed against the taxpayer either before or since the mailing of said deficiency letter, and no part of said sum has been paid by the taxpayer.

There is no provision in the Revenue Act of 1921 requiring a corporation, which, prior to the passage of that Act, had filed its return for a fiscal year ending in 1921, to file any additional return for such year.

In the return filed by the taxpayer on April 14, 1921, an exemption of $2000 was used and this was allowable under the 1918 Revenue Act (Sec. 236, 40 Stat. 1080); but this exemption was not allowable under the 1921 Revenue Act inasmuch as the taxable income of the petitioner exceeded $25,000.00 (1921 Revenue Act, Sec. 236, 42 Stat. 257).

By Sections 263 and 338 of the Revenue Act of 1921 (42 Stat. 271, 277), the provisions of the Act included in Titles II and III, Sections 200-338

(relating to income taxes and profits taxes), were made retroactive, taking effect as of January 1, 1921.

Accordingly, the taxpayer was not entitled to the full exemption claimed of $2000, but only to eleven-twelfths thereof, or $1833.33, since the 1918 Act applied to the first eleven months of the fiscal year ending January 31, 1921.

Apart from this slight discrepancy, the return of the taxpayer filed April 14, 1921, was in accord with the provisions of the 1921 Revenue Act, and the discrepancy was apparent on the face of the return.

In making up the schedules attached to the deficiency letter dated June 3, 1926, the Commissioner made use of the return of the taxpayer, which was filed April 14, 1921, and among other matters made correction of the discrepancy above mentioned.

Relevant statutory provisions are set out in the margin. (These statutory provisions are omitted in this brief.)

The question presented by the present petition for review is whether the applicable period of limitation had run prior to the sending out by the Commissioner of the sixty-day deficiency letter of June 3, 1926.

The Commissioner takes the position that the Statute of Limitations contained in the 1921 Revenue Act is the one applicable; the taxpayer contends that the Statute of Limitations contained in the 1924 Revenue Act is the one applicable.

Inasmuch as the period of limitation is the same (four years from the filing of the return)

under either statute, we pretermit discussion of the question, which statute governed.

The Board of Tax Appeals stated its view of the case as follows:

'*It is stipulated that in the return filed the taxpayer took an exemption in the amount of $2000 in the computation of tax due under the Act of 1918, and that under the Act of 1921, it was not entitled to any such exemption for the fiscal year ended January 31, 1921.* It is obvious, therefore, that an additional tax for the fiscal year ended January 31, 1921, was imposed on this taxpayer by the Revenue Act of 1921. In such circumstances the Commissioner by his regulations, supra, required an additional return. Such return has never been filed, and, therefore, there is no return of this taxpayer for the year ended January 31, 1921, which can be regarded as the return required by law and no date from which the statute of limitations started to run against this petitioner for such taxable year.'

Counsel for the Commissioner on this petition for review take a somewhat different view. In their brief their position is thus stated:

'In this case the statute could be satisfied only by the filing of a return *under* the Revenue Act of 1921. This necessarily means a return filed in response to the requirements of the 1921 Act, and this requirement could not have been satisfied before the statute was enacted',

and again:

'The return under the Act of 1921 could be made only after the enactment of that law. It follows that only upon the filing of a return for the taxable year 1921 some time after the passage of the 1921 Act could the statutory bar begin to

operate. Since petitioner has filed no such return, the Commissioner was and is free to assert a deficiency.'

We cannot agree with either of the positions thus stated. We do not think that it was the intention of Congress that all returns for fiscal years ending in 1921 which were filed prior to the passage of the Revenue Act of 1921 should be considered nullities.

Viewing the facts in the light of the various statutory provisions quoted, we think it is clear that the taxpayer filed its return within the proper time; that the return contained the required information as to the various items; that the error in respect to the exemption appeared on the face of the return, and required no additional information for its correction.

The return would unquestionably have been valid and would have set the Statutes of Limitations in motion if it had been filed the day after the approval of the Revenue Act of 1921; but that Act, by its terms, became effective January 1, 1921. It speaks as of that date, and we have no difficulty in holding that returns filed after January 1, 1921, which contained the information required by the Act were returns *under* the Act. That such was the intent of Congress, we think is shown by the provisions of Sec. 205 (a) of the Act (42 Stat. 232) which reads:

'That if a taxpayer makes return for a fiscal year beginning in 1920 and ending in 1921, his tax under this title for the taxable year 1921 shall be the sum of: * * * (followed by a stated basis);'

and the same section further provides:

'Any amount paid before or after the passage of this Act on account of the tax imposed for such

fiscal year by Title II of the Revenue Act of 1918 shall be credited toward the payment of the tax imposed for such fiscal year by this Act, and if the amount so paid exceeds the amount of such tax imposed by this Act, the excess shall be credited or refunded in accordance with the provisions of Section 252.'

These provisions, when read in connection with Sec. 1400 of the Revenue Act of 1921, (42 Stat. 320), which repealed the Revenue Act of 1918 as of January 1, 1921, and in connection with Section 227 (a) and 241 (a), (42 Stat. 251, 260), which fixed the time for filing returns, *show conclusively, in our judgment, that Congress intended to ratify and adopt the returns filed between January 1, 1921, and the passing of the Act of 1921.* Such a situation was not new. The Revenue Act of 1918, approved February 24, 1919, was also retroactive in its operation. It contained sections practically identical with Sections 227 (a), 241 (a), and 205 (a) of the Revenue Act of 1921. The returns filed before the 1918 Act was passed for fiscal years ending in 1918 were not treated as nullities but as 'original returns'; and if an additional tax was imposed by the Revenue Act of 1918, an additional return or an amended return only was required. See T. D. No. 2797.

Still further, the Commissioner himself, in preparing the sixty-day deficiency letter of June 3, 1926, did not treat the return of the taxpayer, filed April 14, 1921, as a nullity. On the contrary, he made full use of it as a basis for his deficiency letter. We mention this fact not as a ground for waiver or estoppel, but solely as showing that the Government officials whose duty it was to pass upon returns did not hold this par-

ticular return to be a nullity. *The position that the return was a nullity is evidently an afterthought, arising when the question of the Statute of Limitations was raised.*

As to the effect of T. D. Nos. 3305 and 3310, set out in the margin, it may well be doubted whether the 'additional tax' therein mentioned covers or was intended to cover a partial loss of exemption, such as occurred in the case at bar, wherein no new tax was to be levied and no new basis of taxation to be applied. But even if this view is not correct, yet said Treasury Decisions do not purport to make returns already filed nullities, but recognize them and simply call for a further return as to the additional tax.

In the case at bar, no such further return was necessary. The information contained in the return as filed was sufficient and was demonstrated so to be by the Commissioner himself. The filing of a second return after the passage of the Revenue Act of 1921 would have been a useless repetition.

We hold that the return filed April 14, 1921, was made by the taxpayer in good faith and in substantial conformity to both the Revenue Act of 1918 and the Revenue Act of 1921. Such return was not tentative, and was intended as the basis of an assessment. It showed the items of gross income, deductions and credits of the taxpayers. It covered the entire period involved. It was properly signed and verified. *The fact that it contained an inaccuracy did not cause it to become a nullity. United States v. Mabel Elev. Co.*, (D. C.) 17 F. (2d) 109. The Board of Tax Appeals has so held in numerous cases. Mabel Elev.

Co., 2 B. T. A. 517; Indiana Rolling Mills Co., 13 B. T. A. 1141; Darling-McDuff Coal Co., 15 B. T. A. 110; Denholm & McKay Co., 15 B. T. A. 225. And the mere fact that the return was filed before the Revenue Act of 1921 was passed did not cause it to become a nullity. Such has been the ruling of the Board of Tax Appeals in numerous cases. Fred T. Ley & Co., Inc., 9 B. T. A. 749; M. Brown & Co., 9 B. T. A. 753; Keystone Coal & Mining Co., 10 B. T. A. 295; Palmetto Coal Co., 11 B. T. A. 154; Denholm & McKay Co., supra.

It follows from the foregoing that the return was valid and was the return required by existing law; and that the Statute of Limitations began to run from April 14, 1921, the date when the return was filed.

The question involved in this case has been passed upon, and the same conclusion reached, by the Circuit Court of Appeals for the Fifth Circuit in the case of *Myles Salt Co. v. Commissioner,* 49 F. (2d) 232; also by the Court of Appeals of the District of Columbia in the case of *Isaac Goldmann Co. v. Commissioner,* 51 Fed. (2d) 427.

We are in full accord with the well-reasoned opinions in both of these cases, and with the conclusions reached.

The petition for review in the case at bar is granted, and the cause is remanded to the Board of Tax Appeals for further proceedings not inconsistent with the views herein expressed". (Italics supplied).

In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 1037

NATIONAL PAPER PRODUCTS COMPANY, A CORPORATION, petitioner

v.

GUY T. HELVERING, AS COMMISSIONER OF INTERNAL REVENUE

No. 1038

ZELLERBACH PAPER COMPANY, A CORPORATION, petitioner

v.

GUY T. HELVERING, AS COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

A return was filed on July 15, 1925, for the fiscal year ending April 30, 1925, under the Revenue Act of 1924. The Revenue Act of 1926, applicable to the year 1925, was enacted on February 26, 1926. Thereafter a new return was filed under the 1926 Act for the same period. The question involved

is whether the statute of limitations under the 1926 Act began to run from the date of filing the earlier or the later return.

The present cases differ from those presented by the petition in Nos. 1039–1041 in that the transition here was from the 1924 to the 1926 Revenue Acts, while in the other cases the change was from the 1918 Act to the 1921 Act. The present cases also differ from Nos. 1039–1041 in that here a new return was actually filed under the later Act. Although these distinctions, and especially the second, would appear to be not insubstantial, the questions presented here are so closely related to those raised by the petitions in Nos. 1039–1041, where a direct conflict is involved, that we do not oppose the granting of the present petition.

Respectfully submitted.

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FRANK J. WIDEMAN,
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MAY 1934.

U. S. GOVERNMENT PRINTING OFFICE: 1934

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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 35

NATIONAL PAPER PRODUCTS COMPANY, A CORPORATION, petitioner

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

No. 36

ZELLERBACH PAPER COMPANY, A CORPORATION, petitioner

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the Board of Tax Appeals is reported in 26 B. T. A. 92.[1] The opinion of the Cir-

[1] No. 35, R. 21–28; No. 36, R. 18–25.

cuit Court of Appeals [2] is reported in 69 F. (2d) 857.

JURISDICTION

The judgments of the Circuit Court of Appeals [3] were entered February 28, 1934. A joint petition for writs of certiorari was filed May 10, 1934, and granted June 4, 1934.[4] The jurisdiction of this Court is based on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Where a return is filed under the Revenue Act of 1924 prior to the enactment of the Revenue Act of 1926 and thereafter a return for the same period is filed under the 1926 Act because of its retroactivity, whether the statute of limitations under the 1926 Act commences to run from the date of the filing of the earlier or the later return.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in Appendix A, *infra*.

STATEMENT

The facts as found by the Board of Tax Appeals may be summarized as follows: [5]

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[2] No. 35, R. 94–111; No. 36, R. 88.

[3] No. 35, R. 112; No. 36, R. 89.

[4] No. 35, R. 117; No. 36, R. 92.

[5] Unless otherwise specified, references hereinafter made are to the record in No. 35.

Pursuant to the Revenue Act of 1924, Zellerbach Paper Company (petitioner in No. 36) on July 15, 1925, filed a consolidated income tax return for the fiscal year ending April 30, 1925, on behalf of itself and its subsidiaries, one of which was National Paper Products Company (petitioner in No. 35). (R. 22.) Thereafter, the Revenue Act of 1926 was enacted and made applicable to the year 1925.

Treasury Decision 3843 required the filing of an additional return for the same period where the amount of tax was increased by the 1926 Act. (Appendix B, *infra*.) In response to that ruling, the Zellerbach Company on May 14, 1926 [6] filed another return covering the period in question, showing an additional tax. (R. 23.) The affidavit stated that such return was made pursuant to the 1926 Act.

A deficiency notice was mailed to the petitioners on October 10, 1928, pursuant to which the Board of Tax Appeals found deficiencies of $20,657.40 against the National Company (No. 35, R. 29), and $7,601.55 against the Zellerbach Company (No. 36, R. 26). The Board's determination was upheld by the Circuit Court of Appeals. (R. 94–112.)

ARGUMENT

The taxes involved are governed by the 1926 Act. (Sections 286 and 200 (a) of the Revenue Act of

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[6] The record shows 1925 as the year (R. 23), but this is obviously erroneous.

1926, *infra*, p. 6, 7.) The applicable limitation on assessment of taxes due under the 1926 Act is found in Section 277 (a) (1), (*infra*, p. 6), where it is stated:

> The amount of income taxes imposed by this Act shall be assessed within three years after the return was filed, * * *.

The deficiency notice was mailed October 10, 1928 (R. 23), more than three years from the date of the first return (July 15, 1925), but within three years of the second (May 14, 1926).

The present cases differ from those presented by the petition in Nos. 37–39 in that here the transition was from the 1924 to the 1926 Revenue Acts, whereas in Nos. 37–39 the transition was from the 1918 Act to the 1921 Act. The present cases also differ from Nos. 37–39 in that here a new return was actually filed under the later statute. However, all of these cases present substantially the same question, namely, whether the "return" filed under the earlier statute is *the return* required by the later statute. Our position on this issue is set forth in our brief in Nos. 37–39, to which we here make reference.

Such differences as there are between these cases and Nos. 37–39 would seem to make the Commissioner's position stronger here. The character of the change from the 1924 Act to the 1926 Act, particularly in the rate of taxation, was more funda-

mental than the changes involved in the other two Acts. Consequently, it is all the more reasonable to assume that Congress never intended to adopt the old returns.

CONCLUSION

The judgments below should be affirmed.

Respectfully submitted.

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OCTOBER 1934.

APPENDIX A

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 200. When used in this title—

(a) The term "taxable year" means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed under section 212 or 232. The term "fiscal year" means an accounting period of twelve months ending on the last day of any month other than December. The term "taxable year" includes, in the case of a return made for a fractional part of a year under the provisions of this title or under regulations prescribed by the Commissioner with the approval of the Secretary, the period for which such return is made. The first taxable year, to be called the taxable year 1925, shall be the calendar year 1925 or any fiscal year ending during the calendar year 1925.

* * * * *

(U. S. C. App., Title 26, Sec. 931.)

SEC. 273. As used in this title in respect of a tax imposed by this title the term "deficiency" means—

(1) The amount by which the tax imposed by this title exceeds the amount shown as the tax by the taxpayer upon his return; * * *.

* * * * *

(U. S. C. App., Title 26, Sec. 1047.)

SEC. 277. (a) Except as provided in section 278—

(1) The amount of income taxes imposed by this Act shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

* * * * *

(U. S. C. App., Title 26, Sec. 1057.)

SEC. 278. (a) In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

* * * * *

(U. S. C. App., Title 26, Sec. 1058.)

SEC. 286. This title shall take effect as of January 1, 1925, except that section 257 and sections 271 to 285, inclusive, and this section, shall take effect on the enactment of this Act.

(U. S. C. App., Title 26, Sec. 941.)

Treasury Regulations 69, promulgated under the Revenue Act of 1926:

ART. 631. *Affiliated corporations.*—Consolidated returns are based upon the principle of levying the tax according to the true net income of a single enterprise, even though the business is operated through more than one corporation. Where one corporation owns the capital stock of another corporation or other corporations, or where the stock of two or more corporations is owned by the same interest, a situation results which is closely analogous to that of a business maintaining one or more branch establishments. In the latter case, because of the

direct ownership of the property, the net income of the branch forms a part of the net income of the entire organization.

ART. 632. *Consolidated returns.*—Affiliated corporations as defined in section 240 (d), irrespective of the basis upon which returns were filed prior to 1926 under section 240 (a) of the Revenue Acts of 1924 and 1926, may for 1926 elect to make separate returns or file a consolidated return in which will be reported the consolidated net income of the affiliated group. If return is made upon either of these bases, all subsequent returns must be made upon the same basis except as permission to change may be granted by the Commissioner. In applying for permission to change from one basis to the other there should be submitted a statement in the form of an affidavit executed by a person or persons qualified to sign the returns (see section 239) setting forth completely the reasons for making the request.

* * * * *

ART. 633. *When corporations are affiliated.*—For the taxable year 1925 two or more domestic corporations will be deemed to be affiliated if one corporaton owns at least 95 percent of the voting stock of the other or others, or if at least 95 percent of the voting stock of two or more corporations is owned by the same interests. For 1926 and subsequent taxable years two or more domestic corporations will be deemed to be affiliated if one corporation owns at least 95 percent of all the stock of the other or others, exclusive of nonvoting stock which is limited and preferred as to dividends, or if at least 95 percent of the stock of two or more corporations, exclusive of nonvoting stock limited and preferred as to dividends, is owned by the same interests.

ART. 634. *Change in ownership during taxable year.*—(*a*) Where corporations are affiliated at the beginning of a taxable year but due to a change in stock ownership during the year the affiliated status is terminated, or (*b*) where corporations are not affiliated at the beginning of the taxable year but through change of stock ownership during the year become affiliated, a full disclosure of the circumstances of such changes of stock ownership shall be submitted to the Commissioner.

Ordinarily in such cases, where only two corporations are involved, the parent or principal corporation, under the conditions described in (*a*) above, should file a consolidated return including the income of such subsidiary or subordinate corporation to the date of the change of stock ownership, and each should file a separate return from the date of such change in stock ownership to the end of the taxable period, and, under the conditions described in (*b*) above, each corporation should file a separate return from the beginning of the taxable period to the date of the change in stock ownership, and a consolidated return should be filed by the parent or principal corporation from the date of change of stock ownership to the end of the taxable year, including therein the income of the subsidiary or subordinate corporation for such period.

* * * * *

APPENDIX B

T. D. 3843 (V–1 Cumulative Bulletin 99), approved April 1, 1926:

> *To Collectors of Internal Revenue and Others Concerned:*
>
> Any corporation which has filed a return for a fiscal year ending in 1925 and paid or become liable for a tax computed under the Revenue Act of 1924, and is subject to additional tax for the same period under the Revenue Act of 1926, must file a new return covering such additional tax on or before May 15, 1926. Payment of the additional tax may be made at the time the return is filed or, if installment payments are desired, such installments must be paid at the time they would be due if based upon a return for the fiscal year ended February 28, 1926.

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SUPREME COURT OF THE UNITED STATES.

Nos. 35 and 36.—October Term, 1934.

National Paper Products Company, Petitioner, 35 *vs.* Guy T. Helvering, as Commissioner of Internal Revenue, Respondent. Zellerbach Paper Company, Petitioner, 36 *vs.* Guy T. Helvering, as Commissioner of Internal Revenue, Respondent.	On Writs of Certiorari to the Circuit Court of Appeals for the Ninth Circuit.

[November 5, 1934.]

Mr. Justice Cardozo delivered the opinion of the Court.

These cases present in slightly different circumstances a question substantially the same as the one considered in Nos. 37 to 39, decided herewith.

Here, on July 15, 1925, the Zellerbach Paper Company filed for itself and its subsidiary, National Paper Products Company, a consolidated return under the Revenue Act of 1924 (43 Stat. 253) for the fiscal year ending April 30, 1925.

On February 26, 1926, the Revenue Act of 1926 (44 Stat. 9) was enacted, effective retroactively in respect of income taxes (with exceptions not now important) as of January 1, 1925. §§ 286, 1200.

The tax payable by the petitioners for the preceding fiscal year was changed by the new act in one respect only. For the four months of that year following January 1, 1925, the 12½ per cent tax fixed by the Act of 1924 was increased to 13 per cent [§ 230 (a) (1)], an amount ascertainable through a simple computation when once the data had been supplied for separating income attributable to 1925 from income attributable to an earlier time. For other taxpayers differently situated the changes might be different or greater. So far as the new act affected the petitioners it changed the rate and nothing else.

In accordance with Treasury Decision 3843* which called for an additional return whenever there was an additional tax, the Zellerbach Paper Company for itself and its subsidiary filed a document which amounted to an "amended return" and was so stamped by a representative of the Commissioner of Internal Revenue. The new return did not repeat what had been stated in the return of July, 1925, then upon the files. All that it did was to refer to the net income as previously reported, and then apply the new rate to that part of the income stated to be attributable to 1925.

On October 10, 1928, the Commissioner of Internal Revenue gave notice of deficiency assessments against the two petitioners. The period of limitation prescribed by the Act of 1926 is three years after the filing of the return. § 277 (a) (1). If the three years began to run upon the filing of the original return in July, 1925, the assessments were too late. If the term began to run when the additional return was filed (May 14, 1926), the assessments were in time.

The Court of Appeals for the Ninth Circuit affirmed the determination of the Board of Tax Appeals (26 B. T. A. 92), upholding the action of the Commissioner [69 F. (2d) 857], and again, as in Nos. 37 to 39, refused to adhere to a contrary ruling in courts of coordinate jurisdiction. *Myles Salt Co., Ltd.* v. *Commissioner,* 49 F. (2d) 232; *Isaac Goldmann Co.* v. *Commissioner,* 51 F. (2d) 427; *Valentine-Clark Co.,* 52 F. (2d) 346. Writs of certiorari followed. 292 U. S. 621.

The points of difference between these cases and Nos. 37 to 39 are these: Here the new statute was the Revenue Act of 1926, superseding as of January 1, 1925, the Act of 1924; there the new statute was the Act of 1921, superseding as of January 1, 1921, the Act of 1918. Here the change applicable to the petitioners was an increase of the rate; there the applicable change was the disallow-

*"Any corporation which has filed a return for a fiscal year ending in 1925 and paid or become liable for a tax computed under the Revenue Act of 1924, and is subject to additional tax for the same period under the Revenue Act of 1926, must file a new return covering such additional tax on or before May 15, 1926. Payment of the additional tax may be made at the time the return is filed or, if installment payments are desired, such installments must be paid at the time they would be due if based upon a return for the fiscal year ended February 28, 1926."

ance of a credit. Here the taxpayers filed an additional return, supplementing the original one by a statement of the additional taxes due; there the taxpayer stood upon the original return, and omitted to file another.

The conclusion is unaffected by any of these points of difference.

For reasons stated in our opinion in Nos. 37 to 39, the period of limitation began to run on the filing of the first return, and a return for additional taxes, even if filed afterwards, was an amendment or supplement which did not toll the statute.

The decree should be reversed, and it is

So ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.